TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 53

GULF, COLORADO & SANTA FE RAILWAY
COMPANY, PETITIONER,

vs.

MRS. OLENA MOSER, ADMINISTRATRIX

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS,
THIRD SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

PETITION FOR CERTIORARI FILED APRIL [illegible], [illegible]

CERTIORARI GRANTED MAY [illegible], [illegible]

([illegible])

Morel

Verdict 34000 – Remittitur 28 – Left wife & Child. F.E.E.R. Earning $1800 =
No evidence as to what he gave his wife. ~~[illegible]~~ Whole salary –
~~[illegible]~~ loss to the 6% – [illegible] 6.5 =
$73000. Verdict seems high =
Instructions as to Damages R.P. 21. Did not make clear the measure [illegible] the elements
[illegible]. These requested at p 9 –

See pages

10 v Kelly 240 NS,

(   )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MRS. OLENA MOSER, ADMINISTRATRIX

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, STATE OF TEXAS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 6, 1926

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[fols. a 6] **IN COURT OF CIVIL APPEALS OF TEXAS**

MINUTE ENTRY OF JUDGMENT

Be it remembered, that at a Term of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, begun and holden, at the City of Austin, Texas, on the First Monday in October, A. D. 1925, and ending on the first Monday in July, 1926, by terms of the law, the following among other, proceedings were had, towit:

Wednesday, October 21, 1925.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,
vs.
MRS. OLENA MOSER, Administratrix, et al., Appellees

Appeal from District Court of Bell County

Judgment affirmed.

[fol. 7] IN DISTRICT COURT OF BELL COUNTY, TEXAS,
OCTOBER TERM, A. D. 1923

No. —

MRS. OLENA MOSER, Administratrix, Plaintiff,

vs.

GULF, COLORADO & SANTA FE RY. CO., Defendant

AMENDED PETITION—Filed December 4, 1923

To the Hon. Lewis H. Jones, judge of said court:

[fol. 8] 1

Now comes plaintiff Mrs. Olena Moser, Administratrix and leave of the Court being first had and obtained files this her first amended petition in lieu of the original filed herein on the — day of — A. D. 1923, and for cause of action represents unto the court:

2

That since the filing of this suit by plaintiff as Temporary Administratrix of the Estate of John H. Moser, that plaintiff Mrs. Olena Moser has been appointed by the County Judge of Bell County, Texas, sitting in probate as permanent administratrix of said estate, and that she has duly qualified as such, and has taken the oath and made the bond required by law. That letters as such administratrix, and of administration have been issued to her by the Clerk of the County Court of Bell County, Texas, that by virtue of her said appointment and qualification she is the personal representative of the said John H. Moser and his estate, and she now appears herein as such administratrix, and prosecutes this suit, and that she resides in Bell County, Texas.

3

That the defendant is a railroad corporation, duly and legally created and existing under and by virtue of the laws of the State of Texas, and owns and operates a line of railroad running in and through the State of Texas, and in and through the County of Bell, and thence in and through the County of Burleson and on to the City of Galveston, all in said state, and in connection therewith, employs and works a large number of trainmen, including brakemen, engineers and conductors who run and operate the trains of defendant for it over its said line of railway, and the said defendant has been duly cited to appear and answer herein, and has entered its appearance in this cause.

[fol. 9]

4

Plaintiff represents that on the days and dates herein mentioned, the defendant was a common carrier by railroad and engaged in commerce between the State of Texas and the State of Oklahoma and between the State of Texas and various other states throughout the United States of America, and that the deceased John H. Moser, hereinafter referred to, at the time he received the injuries resulting in his death was employed by the defendant in such interstate commerce, and at the time he received such injuries, was in the performance of duties to interstate commerce.

5

That heretofore, to wit on or about the 23rd day of April A. D. 1923, John H. Moser, the husband of this plaintiff, was employed by the defendant in the capacity as a brakeman, working as a trainman in the operation of one of defendant's trains over its said line of railroad, and doing any and all things required of him by the defendant in connection with such work. That while so employed, his duties in that behalf required him to do and perform all the services usually and customarily rendered and performed by such employes in that service, as well as all things which the defendant might command and require him to do. That on or about said date, while in the usual and customary pursuit of his duties, near Lyons in Burleson County, Texas, and while acting as a brakeman on a train of said defendant, then and there being operated by the defendant over its said line of railroad, and while in the performance of his duties on one of the cars in said train of defendant, the said John H. Moser fell through the floor of said car, the same being a freight car, and was run over by said train and sustained injuries resulting in his death. That plaintiff and the said John H. Moser at the time he received said injuries and prior thereto resided in Bell County, Texas.

[fol. 10] 6

Plaintiff alleges that she is the surviving wife of said John H. Moser, deceased, and that Mary Virginia Moser, a girl about eighteen months of age at the time of her father's death, is the child of plaintiff and the said John H. Moser, and that the said John H. Moser left surviving him no other child or children.

7

Plaintiff brings this suit for the use and benefit of herself and the said Mary Virginia Moser, above mentioned.

8

Plaintiff represents that the injuries and death of the said John H. Moser were caused by the negligence and carelessness of the defendant as follows:

It was the duty of the said defendant to furnish to the said John H. Moser a safe place to work, and safe cars on and about which to work, but notwithstanding its duty in that respect it carelessly and negligently was transporting in said train, and furnished a car in said train on which and about which the said John H. Moser was employed and required to work, that was defective and dangerous, in that the floor of said car which was made of iron, steel or some other metal, through use, wear or exposure had become so rusted, eroded and worn so that the same was insecure to sustain the weight of a man stepping upon the same, and said floor was insecurely fastened in said car so as to prevent one stepping on the same from falling through. And the said John H. Moser, while in the performance of his duties, stepped upon the floor of said car, and the same being rusted, eroded and worn, and that portion of said floor being insecurely fastened in said car, he the said John H. Moser, fell through the same upon the track of said railroad and was run over and killed by said train, through the carelessness and negligence of the defendant aforesaid.

That the said defendant, its servants, agents and employes knew of the said rusted, eroded, worn, insecure and [fol. 11] defective condition of said car, or by proper inspection should and would have known of the same, but carelessly, and negligently failed to repair or remedy the same, and failed to give the said John H. Moser any notice of such condition and failed to warn him or advise him of the danger or of the condition thereof.

9

Plaintiff alleges that the negligence of the defendant aforesaid was the direct and proximate cause of the injury and death of the said John H. Moser.

10

Plaintiff alleges that at the time of his death, which occurred on or about the 23rd day of April A. D. 1923, the said John H. Moser was twenty eight years of age, in good health and well qualified for the discharge of his duties; that he was an experienced brakeman, and well qualified for the pursuit of said occupation, and at the time of his death and for a long time prior thereto, he did earn and receive therefrom the sum of two thousand dollars per annum, that according to the rules of said railway company, and according to the custom in vogue of said railway company was in line for promotion and according to the rules of *seignority* in vogue and practice and according to the said rules and customs of said railway company, and within a very short time, would have been entitled to and would *and* — have been promoted to the position of conductor in the service of said company and would have earned therefrom and thereby the sum of three thousand dollars per annum, and would have continued to earn the same during the term of his natural life.

That he had since his marriage with his wife worked for the support of his family consisting of plaintiff and said child Mary Virginia Moser, providing them with the necessities of life, and spending his earnings upon them, and would have educated the child above mentioned in a manner suitable to his station in life. That the said John H. Moser was a man of exemplary habits, devoted to his family, [fol. 12] kind and affectionate, and that *the* would have given his said child the benefit of a father's care, training and advice and counsel, that said child and plaintiff were dependent upon his earnings for their support, maintenance and education.

11

Plaintiff further alleges that the said John H. Moser sustained his said injuries without any fault or negligence on his part, and that at the time of his injury he was wholly unaware of the danger and peril which confronted him. Plaintiff alleges that by reason of the premises, she and the said Mary Virginia Moser have sustained actual damages in the sum of eighty thousand dollars.

12

Wherefore plaintiff prays the court that upon final hearing hereof, she have judgment, as administratrix, for the sum of Eighty Thousand Dollars, and that the same be apportioned among the parties entitled thereto in such shares as the Jury and Court may see fit, for costs of suit and for such other and further relief, special and general, in law and in equity as plaintiff may show they are entitled to receive.

A. L. Curtis, Attorney for Plaintiff.

[File endorsement omitted.]

In District Court of Bell County

[Title omitted.]

Amended Answer—Filed December 6, 1923

Now comes the defendant, leave of the Court being first had and obtained, and files this its First Amended Original Answer heretofore filed herein, and for amendment says: [fol. 13] Now comes the defendant, Gulf, Colorado & Santa Fe Railway Company, and excepts to plaintiff's petition filed herein, and says the same is insufficient in law and of this it prays judgment of the Court.

W. W. Hair, Terry, Cavin & Mills, Lee, Lomax & Wren, Attorneys for Defendant.

For answer herein, this defendant denies all and singular the allegations in plaintiff's petition contained, and says that it is not guilty of the wrongs, injuries and trespasses complained of, and of this it puts itself upon the country.

W. W. Hair, Terry, Cavin & Mills, Lee, Lomax & Wren, Attorneys for Defendant.

Further answering herein, defendant says that if deceased was injured as alleged by falling through the floor of the car, that the said car came to the defendant loaded from a foreign line at Gulf Junction, Oklahoma, having been loaded and shipped from the State of Pennsylvania, having been on its journey from the point of shipment in Pennsylvania to Gulf Junction where it was delivered to this defendant in about fourteen days after shipment; that it was delivered to this defendant at said Gulf Junction in and as a part of a train and the defendant had a right under the law and the facts to assume and did assume the floor was in proper and safe condition for use by its employes; but the defendant had said car inspected in the usual and proper way after it received the same, and such inspection failed to reveal the defects in said car, if any, which caused the death of said John H. Moser, and that if the floor of said car was in any way defective, the same was not the result of defendant's negligence or want of proper care on its part in regard thereto.

[fols. 14 & 15] The defendant further says that is there were any defects in said car indicating or suggesting that it was not sufficient to hold a man walking thereover or jumping thereon, that the deceased had the same opportunity to see the same, as did the defendant and its inspectors, and if the defendant or its inspectors should have known of said defect in said car, then deceased should also have known of same, and had notice thereof, and assumed the risk of injury therefrom, and was guilty of negligence in using said floor of jumping thereon, with notice of such defects.

Therefore, defendant says that plaintiff is not entitled to recover, at least to the extent he was guilty of contributory negligence as aforesaid.

W. W. Hair, Terry, Cavin & Mills, Lee, Lomax & Wren, Attorneys for the Defendant.

[File endorsement omitted.]

[fol. 16] IN DISTRICT COURT OF BELL COUNTY

[Title omitted]

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY—Filed December 8, 1923

Defendant requests the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: In the determination of the amount of damages, if any that you will allow on account of the pecuniary loss, if any, sustained by Mrs. Moser, you are charged that if you believe and find that there is a reasonable probability that Mrs. Moser may marry again (and this question you may determine from your experience and judgment) you will confine the award of damages, if any you may make on behalf of the said Mrs. Moser to the period of her probable widowhood as you may determine the same.

W. W. Hair, Lee, Lomax & Wren, Attorneys for defendant.

Special Charge No. 3.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement here is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the rulings of the Court as shown.

Lewis H. Jones, Judge Presiding.

[File endorsement omitted.]

[fols. 17-19] [Title omitted]

Defendant requests the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: You are charged that under the law and the evidence in this case, you will not allow the plaintiff anything on account of any benefit for "the benefit of a father's care, training, advice and counsel" as set up in plaintiff's petition, and you will not allow the plaintiff anything on account of any such matters or take any such matters into consideration in determining your verdict.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

Special Charge No. 4.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court is shown.

Lewis H. Jones, Judge Presiding.

[fol. 20] [Title omitted]

Defendant requests the Court to charge the jury as follows:

Gentlemen of the Jury: In consideration of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining "such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child", for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased, you will make your calculations on the basis of the amount of your award bearing interest at 8%, the undisputed testimony in this case showing that money can be safely loaned at such rate of interest.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

Special Charge No. 7.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[fol. 21] [Title omitted]

Defendant requests the Court to charge the jury as follows:

Gentlemen of the Jury: In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining "such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child," for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased you will make your calculations on the basis of the amount of your award, bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and secured as shown by the testimony in this case.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

Special charge No. 8.

Only asked if Special Charges No. 10 and No. 7 be refused.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[fol. 22] (Title omitted)

Defendant requests the Court to charge the jury as follows:

Gentlemen of the Jury: In determining of your verdict on the question of damages, and the amount, if any, that you will award to Mrs. Moser because of her pecuniary loss by reason of the death of her husband, you will consider that under the law it is the wife's duty to render such service to her husband as the relationship of husband and wife reasonably imposes upon her, and you will determine from the evidence the nature and character of the service that Mrs. Moser would probably have rendered to her husband as wife, had he continued to live, and the draft that would have been made on her time, energy and strength in the rendition of such service; and you will determine further from the testimony what is the reasonable present cash value of such time, energy and strength that by reason of his death are saved to her and that are available to her to be used by her otherwise and such value as so determined by you, you will credit on and deduct from the present cash value of the pecuniary contributions that the said Moser may have made to said wife if he had continued to live, and the difference between such values will constitute your award of damages as to the said Mrs. Moser in answer to Special issue No. 7, and the apportionment thereof.

In this connection you are further charged that in determining the value of the time, energy and strength if any saved to Mrs. Moser on account of the services she would [fol. 23] have rendered to her husband if he had continued to live, you will consider the education of Mrs. Moser, her character and ability to earn money, and such other matters as would give value to her service, in so far as you can determine the same from the evidence before you and from your experience in such matters.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

Special Charge No. 8

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[Title omitted.]

Defendant request the Court to submit to the jury the following:

GENTLEMEN OF THE JURY: You are charged that if Mr. Moser had continued to live, the minor plaintiff would have been under obligations to render service to him as her father until the child reached 21 years of age or married, and by the death of her father she is relieved of the rendition of such service and such draft as the same may have made upon her time, energy and strength, and you are instructed in determining the damages that you may allow [fol. 24] the minor plaintiff under the court's charge, you will determine the present cash value of such services as the said child may have so rendered her said father (and you may determine the same in the light of and under your experience in such matters) and you will deduct the present cash value of such service from the present cash value of any contributions that the father may have rendered his minor daughter if he had continued to live, as you may determine the same from the evidence and under the charge, and the difference will constitute your award of damages as to said minor, and your answer to special issue No. 7 as to the said minor and to the apportionment of the award in behalf of said minor.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

Special Charge No. 19

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[Title omitted]

Defendant requests the Court to submit to the jury the following:

[fol. 25-26] Gentlemen of the Jury: In the consideration of "such nurture, advice and training, if any, as the evidence may show the child may receive from the deceased after the time of his death," as such matters are submitted to you in charge, you will consider only such nurture, advice and training, if any, as if of a character that can be measured by a money value, that is, such as could be supplied by the services of another for compensation, and in the assessment of damages, you will not allow anything on behalf of the minor plaintiff as to such matters except to the extent and in so far as you may believe from the evidence such nurture, advice and training will have to be supplied and will be supplied by the services of another secured for compensation.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendants.

Special Charge No. 11.
Only asked if Special Charge No. 1 and No. 5 are refused.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[fol. 31] [Title omitted]

Defendant requests the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: In determining the question of the probable contributions by Mr. Moser to his wife and child, and his probable earnings, as a basis therefor, if he had not died, you will take into consideration the possible decrease in his wages or earnings, if any, as you may believe will reasonably result in the future, if any, from the return from the abnormal or unusual conditions, the result of the great war the country has recently gone through, to normal or usual conditions, that is such conditions as might reasonable be expected to exist when the influence of the war and the conditions arising out of it are removed, if you find that such a return will probably come; and you will consider such decrease and diminution, if any, in the probable earnings of the deceased, and the result and diminution, if any, in his contributions to his wife and daughter, if any, in so far as in your judgment there will be such decrease and diminution from such purchase, if any, in so far as in your judgment there will be such de- [fol. 32] crease and diminution from such cause.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

Special Charge No. 17.

The above and foregoing special charge was presented and requested by the defendant after the defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed, and made a part of this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[Title omitted]

Defendant requests the Court to charge the jury as follows:

Gentlemen of the Jury: In determining the amount of the probable future earnings of the deceased and his probable contributions to his wife and child under such instructions given you, had Mr. Moser continued to live, you will take into consideration such reasonable decrease in his earning capacity as was reasonable to be expected from advancing age, and such diminution in his income as might reasonably result from such loss of time as he may have from sickness or any other cause, or the reasonable probability, if any, of his being out of employment from any cause (determining such matters in the light of your experience in human affairs) and you will give to each and [fols. 33-37] all of such matters such consideration and weight in the determination of the amount of contributions deceased Moser would probably have made to his wife and child, as you think they are entitled to, and to the extent that you think they should be given such consideration, you will consider them in the reduction of any damages or award you might otherwise make to the wife and child.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Deft.

Special Charge No. 18.

The above and foregoing special charge was presented and requests by the defendant after the defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[fol. 28] [Title omitted]

Defendant requests the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: In determining the question of damages, under the charge and in making your computation as to what amount of damages plaintiff is entitled to recover, you will take into consideration the likelihood of the earnings of the deceased becoming less during the latter years if his life had he lived and also any period of the time that his earnings might cease due to sickness or any other causes, if any, that would in any way lessen his ability to contribute to his family, making such deduction in the amount of damages as you may think should be made on account of such matters.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

[fol. 29] Special Charge No. 24.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the rulings of the Court as shown.

Lewis H. Jones, Judge Presiding.

[Title omitted]

Defendant requests the Court to charge the Jury as follows:

Gentlemen of the Jury: In determining of your verdict on the question of damages and the amount of probable contributions by deceased to his wife and child, you will take into consideration the hazardous nature of the employment in which he was engaged, and make such reduction of such probable contributions as you believe ought to be made on account thereof.

W. W. Hair, Lee, Lomax & Wren, Attys. for Deft.

[fol. 40] Special Charge No. 25.

The above and foregoing special charge was presented and request by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the rulings of the Court as shown.

Lewis H. Jones, Judge Presiding.

[Title omitted]

Defendant requests the Court to charge the Jury as follows:

Gentlemen of the Jury: In determining of your verdict on the question of damages under the charge of the Court, you will take into consideration the possibility or probability of Mrs. Moser marrying again, and make such allowance and deduction in the amount of damages that you might otherwise award, if any, on account of such possibility or probability of remarriage, as in your judgment should be made.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

Special Charge No. 26.

[fol. 41] The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause as defendant's bill of exceptions to the rulings of the Court as shown.

Lewis H. Jones, Judge Presiding.

[fol. 42] IN DISTRICT COURT OF BELL COUNTY

[Title omitted]

CHARGE TO JURY—Filed December 8, 1923

GENTLEMEN OF THE JURY: This case is submitted to you upon special issues, that is, it is submitted to you in the form of questions which you are required to answer, and your answers to the several questions propounded to you will constitute your verdict in the case. You will answer each of the questions from the evidence, and from no other source, and sign each of the same by your foreman, and return the same into Court.

In connection with the questions propounded to you, such legal definitions and statements of the law are given to you as are deemed by the Court necessary and proper to assist you in arriving at the proper answers to the [fol. 43] questions propounded.

1

Ordinary care, is such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

2. Res

2

Negligence is defined to be the want of ordinary care, that is, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

3

Contributory Negligence, as a law term, means such an act or omission on the part of the injured party as an ordinarily — person would not do or suffer to be done under the same or similar circumstances, which concurring with the negligent act or omission of a defendant, becomes a proximate cause of the injury.

4

Proximate Cause. By this phrase is meant, as a law term, an efficient cause without which the injury would not have happened, and from which danger of injury might reasonably have been anticipated as a natural and probable consequence.

5

Assumed Risk. By this term is meant, that an employe of a railway company is held, in law, to assume such risks as are ordinarily incident to the service he engages to perform, and such others as he knows of, or must necessarily have known of in the ordinary discharge of the duties of his service; but risks arising from negligence of the company's employes, that are chargeable to it, are not assumed by an employe unless he knows of them or must necessarily have known of them in the ordinary discharge of the duties of his service, and until then, he has right to assume that risks arising from such negligence do not exist.

6

The burden is upon the plaintiff to prove by a preponderance of the evidence the affirmative of all the issues [fol. 44] herein presented with the exception of contributory negligence and assumed risk, the evidence to be considered in its entirety no matter by which side adduced.

7

The burden is upon the defendant to prove by a preponderance of the evidence, to be considered in its entirety no matter by which side adduced, the affirmative of its defenses of contributory negligence and assumed risk.

8

It was the duty of the Gulf, Colorado & Santa Fe Railway Company, to exercise ordinary care to furnish to John H. Moser, a reasonably safe place to work and perform his duty, and reasonably safe cars on and about which to work and perform such duties, and its failure to do so would be negligence.

9

It was the duty of the deceased, John H. Moswr, to exercise for his own safety such care as a man of ordinary prudence would have exercised under the same or similar circumstances, and if you find at the time of the accident, deceased failed to exercise for his own safety such care as a man of ordinary prudence would have exercised under the same or similar circumstances, and such failure proximately contributed to the injury received, then he would be guilty of contributory negligence.

10

You are further instructed that any issue of fact herein may *by* established by direct evidence or by circumstantial evidence, or by both.

Bearing in mind the foregoing definitions and statements of the law, you will answer the following special issues:

Special Issue No. 1

Do you find from the evidence that the deceased, John H. Moser, while in the performance of his duties stepped [fol. 45] upon the floor of the car in question, and fell through the same and was thereby killed? Let your answer be "yes" or "no."

Answer: Yes. J. E. Hudson, Foreman.

Special Issue No. 2

Was the defendant, Railway Company, at the time of the death of John H. Moser, transporting in one of its trains, upon which he was riding, a car, the floor of which, through use, rust or exposure, was unsafe?
Let your answer be "yes" or "no."
Answer. Yes. J. E. Hudson, Foreman.

If you have answered special issue number two in the affirmative then you will answer the following question, otherwise you will not answer same.

Special Issue No. 3

Was the defendant negligent, as that term has been hereinbefore defined, in transporting said car in its train in such condition? Answer "yes" or "no."
Answer. Yes. J. E. Hudson, Foreman.

If you have answered special issue number two, or if you have answered special issue numbers two and three in the affirmative, then you will answer special issue number four.

Special Issue No. 4

Do you find from the evidence that such negligence, if any, was the proximate cause of the death of said John H. Moser? Let your answer be "yes" or "no."
Answer. Yes. J. E. Hudson, Foreman.

[fol. 46] If you have answered special issue number four in the affirmative, that is, "yes", then you will answer special issue No. Five.

Special Issue No. 5

Do you find from the evidence that the deceased, John H. Moser, was guilty of contributory negligence, as that term has been defined in paragraph three hereof, in stepping upon the floor of said car, under all the facts and circumstances in this case? Let your answer be "yes" or "no".

Answer. No. J. E. Hudson, Foreman.

Bearing in mind the definition and instructions relative to assumed risk given you in paragraph five hereof, you will answer Special Issue No. Six.

Special Issue No. 6

Do you find from the evidence that the death of the deceased resulted from a risk which he assumed as a result of his employment? Let your answer be "yes" or "no".
Answer. No. J. E. Hudson, Foreman.

Regardless of what your answers may be to the questions submitted in this charge, you will assess damages, and you will arrive at the amount thereof by assessing the same at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of the said John H. Moser, if he had not died on the date alleged. By pecuniary loss is meant such loss as may be compensated for in money. In answering special issue No. 7, you will take into consideration the contribution of money and other pecuniary benefits, if any, which the evidence may show that said surviving wife and child would have received from him after the [fol. 47] time of his death, if he had continued to live; and in estimating the pecuniary loss suffered by the minor child of the deceased by reason of his death, you may take into consideration such advice and training if any, as the evidence may show that the child would have received from deceased after the time of his death, if he had continued to live, but in determining the amount of damages that you may award, if any, to the minor Mary Virginia Moser, under this charge and under special issue No. 7 and the apportionment of such award, you will confine yourselves in the consideration of such contributions that the deceased Moser might have made to his said minor child to the period of her minority.

But you are instructed that you can not consider for any other purpose the solace or grief of loss of society and companionship suffered by the deceased's widow and child.

X
p, 24 to 26

or either of them by reason of his death, or for grief and distress on account of his death, and you can not award them or either of them any damages by way of solace or comfort for the death of the deceased; and in assessing the damages if any, you will confine yourselves solely to the determination of the pecuniary and monetary interest, if any, that the plaintiff and her child had in the continued life of deceased.

If you have answered special issue No. 5 "yes," then you are charged and instructed that in assessing the damages, you will diminish the same in proportion as find that such failure, if any, on the part of the deceased, to exercise ordinary care for his own safety contributed to the accident complained of.

Bearing in mind the foregoing definitions and instructions on the measure of damages, you will answer special issue No. seven.

Special Issue No. 7

[fol. 48] What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they respectively suffered by reason of his death, if any? This question you will answer by stating the aggregate amount of such pecuniary loss or damage, and you will answer in the space below the amount you find from the evidence.

Answer, $34,000.00. J. E. Hudson, Foreman.

You will apportion the amount so found, if any, between the plaintiff, Olena Moser, and the minor child, Mary Virginia, in such shares and amount as you deem proper, and find each entitled to, if any, in the space below.

To Olena Moser, $18,000.00.
To Mary Virginia Moser, $16,000.00.

14

You, the jury, are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given their testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

Lewis H. Jones, Judge 27th Judicial District of Texas.

[File endorsement omitted.]

In District Court of Bell County

[Title omitted]

Defendant's Exception to Charge to Jury—Filed December 8, 1923

Now comes the defendant, the Court having overruled defendant's special charge No. 1, being a request for peremptory instruction, and having submitted to counsel the Court's main charge, and now here at the time and place [fol. 49] required by law, defendant files its objections and exceptions to the Court's charge, to wit:

1

(a) To subdivision 8 of the charge, because it does not properly define the duty of the defendant as applicable to the facts of this case, and that portion thereof, reading, "That it was the duty of the defendant to exercise ordinary care to furnish John H. Moser a reasonably safe place to work and perform his duty, and reasonably safe cars on or about which to work and perform such duty," is not a correct definition of defendant's duty as applied to the facts of this case, and is misleading, and the same casts upon the defendant a burden greater and more onerous than the law requires, and the charge and definition is upon the weight of the evidence in that it in affect submits an issue which there is no evidence to support, and is not a correct statement of the law applied to the facts of this case. (a)

2

(b) Defendant excepts to special issue No. 2, and urges to said special issue all and singular the same objections that are urged to paragraph eight of the charge, and further because the same is too broad and is not a correct statement of the issue of negligence under the facts of this case, and in effect submits an issue which under the law and under the facts is without support of the evidence. (b)

3

(c) Defendant objects and excepts to special issue No. 3 for all and singular the same reasons set forth in its objections to special issue No. 2 and its objections to subdivision eight of the Court's charge. (c)

4

p21

To subdivision 11 of the Court's charge, and the charge on the measure of damages therein contained, because: [fol. 50] D (a) The Court instead of telling the jury that they will arrive at such sum as if paid in cash at this time will be sufficient to fairly compensate the surviving wife and child etc., should tell the jury that they will assess the plaintiff's damages at the present value of the contributions in money (or other thing of value if there be any other thing of value to be considered under the testimony, which defendant denies) that they may find from the evidence deceased would probably have made if he had continued to live, and should explain to the jury how much present value of such contributions may be determined under the evidence, and confining them to that portion of the evidence which affords a basis for the determination of such present value. D.

E. (b) Because the Court should confine the jury in their determination of damages to contributions in money, and should not submit to the jury other pecuniary benefits or any other elements except such monetary contributions, because there is no evidence in this record that warrants a finding or will support a finding of pecuniary benefits or benefits having a monetary value that the jury could determine in money other than the contributions of money and the charge on the measure of damages should be confined to that element and that alone. E.

F (c) To that language in said definition "And other pecuniary benefits, if any, which the evidence may show the said surviving wife and child would receive from him after the time of his death if he had continued to live," because there is no evidence in this record of any other pecuniary benefits shown to have a monetary vaoue or evidence on which a monetary value may be assessed other than contributions in money, and such charge is a charge upon the weight of the evidence and without evidence to support. F.

G. (d) Because said charge in so far as it submits to the jury the question of such nurture, advice and training, if any, as the evidence may show the child would receive from deceased if he had continued to live, because there is no [fol. 51] evidence that the child would have received from the deceased any nurture, advice or training of any character whatsoever, there being no testimony upon the subject; and there is no evidence that he had any qualifications or training that qualified him to render service in the way of nurture, advice or training; or such would be of value, and there is no evidence that any nurture, advice or training that he might have given his child had any pecuniary value and if so what it was, or that it was zapable of being compensated for in money. G.

H. (e) Because the recovery for pecuniary benefits on the part of the wife, Mrs. Moser, is not confined to the period of her widowhood or until she may marry again, to be determined by the jury. H.

I. (f) Because as to the damage to the child and possible pecuniary contributions are not confined to the child, the jury are not confined to the period of the child's minority. I.

J. (g) To that portion of said charge beginning with the words "You are instructed that you cannot consider for any purpose the solace" and ending with the words, "continued life of deceased," because said charge is not as clear and specific and nroad in its application as it should be, and-is indefinite in its terms, and for this portion of said charge, defendant's special charge No. 22 should be substituted. J.

K. (h) Because said charge on the measure of damages is fenerally too broad and not definite and specific enough and the jury should be limited in their consideration of the measure of damages, and the damages to be awarded, and should be further and more in detail instructed as to matters they can consider and the way their verdict should be arrived at more fully shown and in line with defendant's requested charges on the issue of damages. K.

To Special issue number 7m because:

M. (a) It does not give the jury any rule or formula by which the jury may determine the amount of money that if paid now will fairly and reasonably compensate the surviving widow and child for the actual pecuniary loss, [fol. 52] etc. M.

N. (b) Because it does not confine the jury to that portion of the testimony, to wit, *the testimony, to wit,* the testimony offered by defendants, which affords and furnishes a basis, and the only basis shown by the testimony for determining the present monetary value of the pecuniary contributions that under the testimony the jury are entitled to consider. N.

O. (c) Because the compensation is not confined as to the widow, to the period of her widowhood to be determined by the jury. O.

P. (d) Because the compensation as to the minor is not confined to her period of minority. P.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

The above and foregoing objections and exceptions having been presented to the Court at the time and place required by law, and after the Court had refused defendant's request for peremptory instruction, and had submitted to counsel its general charge, and the said objections having been considered by the Court, were in all things overruled and said objections and exceptions with this endorsement hereon are here ordered filed and made a part of the record in this cause as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[File endorsement omitted.]

IN DISTRICT COURT OF BELL COUNTY

[Title omitted]

JUDGMENT

On the 6th day of December A. D. 1923, this cause being regularly called in its order for trial, all parties, both plaintiff and defendant appeared and announced ready for trial, [fol. 53] whereupon a jury of twelve good and lawful men were duly impaneled and sworn to try said cause, and thereafter, the evidence being introduced, the charge of the Court submitted to the jury and argument of counsel made, the jury retired to consider its verdict, the same being submitted to the jury upon special issues, and thereafter, towit, on December 8, A. D., 1923, the jury returned into Court its answers to the special issues submitted, as follows:

"Special Issue No. 1

Do you find from the evidence that the deceased, John H. Moser, while in the performance of his duties stepped upon the floor of the car in question and fell through the same and was thereby killed? Let your answer be "yes" or "no."

Answer "Yes." J. E. Hudson, Foreman.

Special Issue No. 2

Was the defendant, Railway Company, at the time of the death of John H. Moser, transporting in one of its trains, upon which he was riding, a car, the floor of which through use, rust or exposure, was unsafe? Let your answer be "yes" or "no."

Answer "Yes." J. E. Hudson, Foreman.

Special Issue No. 3

Was the defendant negligent, as that term has been hereinbefore defined, in transporting said car in its train in such condition? Answer "yes" or "no."

Answer: Yes. J. E. Hudson, Foreman.

Special Issue No. 4

Do you find from the evidence that such negligence if any was the proximate cause of the death of the said John H. Moser? Let your answer be "yes or "no."

Answer. Yes. J. E. Hudson, Foreman.

Special Issue No. 5

Do you find from the evidence that the deceased, John H. Moser, was guilty of contributory negligence, as that term had been defined in paragraph three thereof, in stepping [fol. 54] upon the floor of said car, under all the facts and circumstances in this case? Let your answer be yes or no.

Answer. No. J. E. Hudson, Foreman.

Special Issue No. 6

Do you find from the evidence that the death of the decreased resulted from a risk which he assumed as a result of his employment? Let your answer be yes or no.

Answer. No. J. E. Hudson, Foreman.

Special Issue No. 7

What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they respectively suffered by reason of his death, if any? This question you will answer by stating the aggregate amount of such pecuniary loss or damage, and you will answer in the space below the amount you find from the evidence?

Answer. $34,000.00. J. E. Hudson, Foreman.

You will apportion the amount so found, if any, between the plaintiff, Olena Mosler, and the minor child, Mary Virginia Moser, in such shares and amount as you deem proper, and find each entitled to, if any, in the space below.

To Olena Moser, $18,000.00

To Mary Virginia Moser, 16,000."

The Court having received the verdict of the jury and its answers to the respective issues submitted, is of the opinion that plaintiff, Mrs. Olena Moser as administratrix is entitled to recover of and from the defendant, Gulf, Colorado & Santa Fe Railway Company the sum of $34,000.00, and it is further ordered, adjudged and decreed by the Court that said plaintiff do have and recover of and from the defendant the sum of $34,000.00 and that the said amount be apportioned as follows:
[fols. 55-57] $18,000.00 to Mrs. Olena Moser, and $16,000.00 to Mary Virginia Moser, and that the said amount of $34,000.00 bear interest at the rate of six per cent from and after December 8, 1923.

It is further ordered, adjudged and decreed by the Court that said plaintiff recover of and from said defendant all costs in this behalf expended for all of which let execution issue.

(Entered Volume "V," page 216, et seq., of the Civil Minutes of the District Court of Bell County, Texas.)

[fol. 58] IN DISTRICT COURT OF BELL COUNTY

[Title omitted]

AMENDED MOTION TO SET ASIDE VERDICT AND FOR A NEW TRIAL—Filed January 3, 1923

Now comes the defendant, the Gulf, Colorado & Santa Fe Railway Company, and leave of the Court being first had, files this its Amended Motion for a new trial in lieu of its motion for a new — filed on the 10th day of December, 1923, and now and here moves the court to set aside the verdict of the jury heretofore rendered in this cause to grant a new trial herein, and for grounds of this motion respectfully shows to the court:

III

The Court erred in refusing to give sefendant's special charge No. 3, as follows:

"In the determination of the amount of damages, if any that you will allow on account of the pecuniary loss, if any, sustained by Mrs. Moser, you are charged that if you believe and find that there is a reasonable probability that [fol. 59] Mrs. Moser may marry again (and this question you may determine from your own experience and judgment) you will confine the award of damages, if any you may make on behalf of the said Mrs. Moser to the period of her probable widowhood as you may determine the same."

IV

The Court erred in refusing to give defendant's Special Charge No. 4 as follows:

"You are charged that under the law and the evidence in this case, you will not allow the plaintiff anything on account of any benefit for the benefit of a father's care, training, advice and councils as set up in plaintiff's petition, and you will not allow the plaintiff anything on account of any such matters or take any such matters into consideration in determining your verdict."

[fol. 60]

VII

The Court erred in refusing to give defendant's Special Charge No. 7, as follows:

"In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining 'such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child,' for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased, you will make your calculations on the basis of the amount of your award bearing interest at 8%, the undisputed testimony in this case showing that money can be safely loaned at such rate of interest."

VIII

The Court erred in refusing to give defendant's Special Charge No. 8, as follows:

"In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining 'such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child,' for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased you will make your calculations on the basis of the amount of your award bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and secured as shown by the testimony in this case."

IX

The Court erred in refusing to give defendant's Special Charge No. 9 as follows:

[fol. 61] "In determining of your verdict on the question of damages, and the amount, if any, that you will award to Mrs. Moser because of her pecuniary loss by reason of the death of her husband, you will consider that under the law it is a wife's duty to render such evidence to her husband as the relationship of husband and wife reasonably imposes upon her, and you will determine from the evidence the nature and character of the service that Mrs. Moser would probably have rendered to her husband as wife, had she continued to live and the draft that would have been made on her time, energy and strength in the rendition of such service, and you will determine further from the testimony what is the reasonable present cash value of such time, energy and strength that by reason of his death are saved to her and that are available to her to be used by her otherwise, and such value as so determined by you, you will credit on and deduct from the present cash value of the pecuniary contributions that the said Moser may have made to said wife if he had continued to live, and the difference between such values will constitute your award of damages as to the said Mrs. Moser in answer to Special Issue No. 7, and the apportionment thereof."

X

The Court erred in refusing to give defendant's Special Charge No. 10, as follows:

"You are charged that if Mr. Moser had continued to live the minor plaintiff would have been under obligations to render service to him as her father until the child reached 21 years of age or married, and by the death of her father she is relieved of the rendition of such service and such draft as the same may have made upon her time, energy and strength, and you are instructed in determining the damages that you may allow the minor plaintiff under the Court's charge, you will determine the present cash value of such services as the said child may have so rendered her said father (and you may determine the same in the [fols. 62-64] light of and under your experience in such matters) and you will deduct the present cash value of such service from the present cash value of any contributions that the father may have rendered his minor daughter if he had continued to live, as you may determine the same from the evidence, and under the charge and the difference will constitute your award of damages as to the said minor, and your answer to Special Issue No. 7 as to the said minor and to the apportionment of the award in behalf of said minor."

XI

The Court erred in refusing to give defendant's Special Charge No. 11, as follows:

"In the consideration of 'such nurture, advice and training, if any, as the evidence may show the child may receive from the deceased after the time of his death,' as such matters are submitted to you in the charge, you will consider only such nurture, advice and training, if any, as is of a character that can be measured by a money value, that is, such as could be supplied by the services of another for compensation, and in the assessment of damages, you will not allow anything on behalf of the minor plaintiff as to such matters except to the extent and in so far as you may believe from the evidence such nurture, advice and training will have to be supplied and will be supplied by the services of another secured for compensation."

[fol. 65]

XVII

The Court erred in refusing to give defendant's Special Charge No. 17, as follows:

"In determining the question of the probable contributions by Mr. Moser to his wife and child, and his probable earnings as a basis therefor, if he had not died, you will take into consideration the possible decrease in his wages or earnings, if any, as you may believe will reasonably result in the future, if any, from the return from the abnormal or unusual conditions, the result of the great war the country has recently gone through, to normal or usual conditions, that is such conditions as might reasonably be expected to exist when the influance of the war and the conditions arising out of it are removed, if you find that such a return will probably come and you will consider such decrease and diminution, if any, in the probable earnings of the deceased, and the result and diminution, if any, in his contributions to his wife and daughter, if any, in so far as in your judgment there will be such decrease and diminution from such cause."

XVIII

The Court erred in refusing to give defendant's Special Charge No. 18, as follows:

"In determining the amount af the probable future earnings of the deceased and his probable contributions to his wife and child under other instructions given you, had Mr. Moser continued to live, you will take into consideration such reasonable decrease in his earning capacity as was reasonably to be expected from advancing age, and such [fols. 66 & 67] diminution in his income as might reasonably result from such loss of time as he may have had from sickness or any other cause, or the reasonable probability, if any, of his being out of employment from any cause (determining such matters in the light of your experience in human affairs) and you will give to each and all of such matters consideration and weight in the determination of the amount of contributions deceased Moser would probably have made to his wife and child, as you think they are entitled to, and to the extent that you think they are entitled to, and to the extent that you think they should be given such consideration, you will consider them in the reduction of any damages or award that you might otherwise make to the wife and child."

[fols. 68 & 69]

XXIV

The Court erred in refusing to give defendant's Special Charge No. 24, as follows:

"In determining the question of damages, under the charge and in making your computation as to what amount of damages plaintiff is entitled to recover, you will take into consideration the likelihood of the earnings of the deceased less during the latter years of his life had he lived and also any period of the time that his earnings might cease due to sickness or other causes, if any, that would in any way lessen his ability to contribute to his family making such deductions in the amount of damages as you think should be made on account of such matters."

XXV

The Court erred in refusing to give defendant's Special Charge No. 25, as follows:

"In determining of your verdict on the question of damages and the amount of probable contributions by deceased to his wife and child, you will take into consideration the hazardous nature of the employment in which he was engaged, and make such reduction of such probable contributions as you believe ought to be made on account thereof."

XXVI

The Court erred in refusing to give defendant's Special Charge No. 26, as follows:

"In determining of your verdict on the question of damages under the charge of the Court, you will take into consideration the possibility or probability of Mrs. Moser marrying again, and make such allowance and deduction in the amount of damages that you might otherwise award, if any, on account of such possibility or probability of remarriage, as in your judgment should be made."

XXXI

[fol. 70] Because the Court erred in overruling defendant's objection and exception to Subdivision 11 of the Court's Charge as follows:

"The Court instead of telling the jury that they will arrive at such sum as if paid in cash at this time will be sufficient to fairly compensate the surviving wife and child, etc., should tell the jury that they will assess the plaintiff's damage at the present value of the contributions in money (or other thing of value if there be any other thing or value to be considered under the testimony, which defendant denies) that they may find from the evidence deceased would probably have made if he had continued to live, and should [fol. 71] explain to the jury how such present value of such contributions may be determined under the evidence, and confining them to that portion of the evidence which affords a basis for the determination of such present value."

XXXII

Because the Court erred in overruling defendant's objection and exception to Subdivision 11 of the Court's Charge as follows:

"Because the Court should confine the jury to their determination of damages to contributions in money, and should not submit to the jury other pecuniary benefits or any other elements except such monetary contributions, because there is no evidence in this record that warrants a finding or will support a finding of pecuniary benefits or benefits having a monetary value that the jury could determine in money other than the contributions of money, and the charge on the measure of damages should be confined to the element and that alone."

XXXIII

Because the Court erred in overruling defendant's objection and exception to Subdivision 11 of the Court's Charge as follows:

"To that language in said definition "And other pecuniary benefits, if any, which the evidence may show the said surviving wife and child would receive from him after the time of his death if he had continued to live; because there is no evidence in this record of any other pecuniary benefits shown to have a monetary value of evidence on which a monetary value may be assessed other than contributions in money, and such charge is a charge upon the weight of the evidence and without evidence to support it."

XXXIV

Because the Court erred in overruling defendant's objection and exception to Subdivision 11 of the Court's Charge as follows:

"Because said charge in so far as it submits to the jury the question of such nurture, advice and training, if any, [fol. 72] as the evidence may show the child would receive from the deceased if he had continued to live, because there is no evidence that the child would have received from the deceased any nurture, advice or training of any character whatsoever, there being no testimony upon the subject; and there is no evidence that he had any qualifications or training that qualified him to render service in the way of nurture, advice or training; or such that would be of value, and there is no evidence that any nurture, advice or training that he might have given his child had any pecuniary value and if so what it was, or that it was capable of being compensated for in money."

XXXV

Because the Court erred in overruling defendant's objection and exception to Subdivision 11 of the Court's Charge as follows:

"Because the recovery for pecuniary benefits on the part of the wife, Mrs. Moser, is not confined to the period of her widowhood or until she may marry again, to be determined by the jury."

[fol. 73]

XXXIII

Because the Court erred in overruling plaintiff's objection and exception to the Court's Charge as follows:

"Because said charge on the measure of damages is generally too broad and not definite and specific enough and the jury should be limited in their consideration of the measure of damages, and the damages to be awarded, and should be further and more in detail instructed as to matters they can consider, and the only way their verdict should have arrived at as more fully shown and in line with defendant's requested charges on the issue of damages."

XXXIX

Because the Court erred in overruling defendant's objection to Special Issue No. 7 as follows:

"It does not give the jury any rule or formula by which the jury may determine the amount of money that if paid now will fairly and reasonably compensate the surviving widow and child for the actual pecuniary loss."

XL

Because the Court erred in overruling defendant's objection to Special Issue No. 7 as follows:

"Because it does not confine the jury to that portion of the testimony, to wit, the testimony offered by defendant, which affords and furnishes a basis, and the only basis shown by the testimony for determining the present monetary value of the pecuniary contributions that under the testimony the jury are entitled to consider."

XLI

Because the Court erred in overruling defendant's objection to Special Issue No. 7 as follows:

"Because the compensation is not confined as to the widow, to the period of her widowhood to be determined by the jury."

[fol. 74]

XLIII

Because the verdict of the jury is grossly excessive in in amount and unwarranted by the testimony in this:

It is for the total of $34,000.00 which at eight per cent, which the undisputed testimony shows money can be made to earn safely without risk net to the lender, will yield the plaintiffs $2,720.00 per year as long as they live and they and their representatives will still at the time of their death have the whole principal of $34,000.00, the amount of their annual income thus provided, under the undisputed testimony will be more than Moser would probably have ever earned if he had lived and lived out his full expectancy and gotten every particle of the promotion there was any reasonable possibility of his having, and this without any allowance or deduction whatsoever for his own support and maintenance or what he would have spent on himself or loss of any time from sickness or any cause, but the verdict amounts to a guarantee to the wife and daughter of a larger income per year than Moser would have made for the next ten or fifteen years by about $900.00 per year, and for the succeeding ten or fifteen years to the extent of about $500.00 per year and allows every dollar of his earnings to them without any deduction for his support and maintenance at all.

XLIV

The verdict of the jury is grossly excessive in the amount and unwarranted by the evidence in this:

That even though the money be figured at seven per cent one per cent less than the undisputed testimony shows it can be invested at safety, it will still bring the plaintiff in an income of $2,480.00 per year during every year that they or either of them live and the principal will be intact at the end, the $2,480.00 per year being anywhere from $250.00 to $600.00 more per year than Moser had any prospect of making for twenty five years after his death and as much as there was any probability of his ever making in the latter part of his life, long after his child had come of age, if he had good luck and had gotten all the promotions he had any chance to get, and this without any allowance for [fols. 75-81] loss of time by sickness or from any other cause, making no allowance for depreciation in capacity for work by old age, and without any allowance for Moser's own support and upkeep or what he would have spent on himself or as he desired other than on his wife and child, the verdict thus guaranteeing to the widow and child a larger income for many years than Moser could make and at all times guaranteeing them against any of the ordinary and usual losses of time of human beings from sickness and other causes and guaranteeing them against any depreciation in the value of wages and guaranteeing them that

Moser would always have a job and would make as rapid advancement as was possible and still preserving for them at the end of their lives to pass to their children and heirs the full sum of the verdict, $34,000.00.

XLV

The verdict of the jury is contrary to law and the evidence and grossly excessive and unwarranted in this:

That it awards the widow and child an amount which at the low rate of six per cent, an unwarrantably low rate to be considered in this connection under the testimony in this case, would nevertheless yield to the plaintiffs $2,040.00 per year, as much or more than an average of what the evidence indicates Moser would have earned had he lived out his full expectancy and lost no time whatever from his work without any deduction for sickness or any like cause causing loss of time and without any deduction for what Moser would have spent on himself, and still at the death of the two plaintiffs the fund would be intact, guaranteeing the wife and daughter against all ordinary contingencies of life and not only so, but guaranteeing them an income of thirty three and one third to fifty per cent in excess of what they had reason to expect from deceased had he continued to live, and still preserve for them the entire principal at the time of their death to their descendants and heirs.

[fol. 82]

LXXII

The jury were probably mislead to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel, Mr. Curtis, in his closing argument as follows, to wit:

"But they want you to render a judgment here to a man who had a life expectancy of thirty six years, with an average earning capacity of $2,300.00 a year based on their own testimony as to the probability of his promotion, which would show an aggregate earning of more than $82,000.00 during his life expectancy, and then come here by these arguments and undertake to get you to reduce this to a judgment on a six per cent basis of $21,000.00 and then indicate they are throwing in some other things on the *sand*";

as fully shown by verified report of said counsel's argument thereto attached and by defendant's Bill of Exceptions No. A1.

LXXIII

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel, Mr. Curtis, in his closing argument as follows, to-wit:

[fol. 83] "Mr. Lee says you should take into consideration here in reducing this to $21,000.00, or in an effort to get you to do it, the fact that if Mr. Moser had lived, that his wife would have owed to him her services, but that by his death, she is relieved of those services, and that therefore you should deduct from the amount of her recovery what it reasonably saved to her in the services which she would have rendered to him if he had lived. Think of that. Mr. Moser in his life time when he married this little woman, when this child came to bless their life, the service which she would and did render to him was of greater value than all that he could ever do for her, and if you were to adopt that rule, she should not receive a cent for his death, because the wife does more for the husband in this life, than the husband could ever do for the wife, but just think of a great railway lawyer in this State, representing a great railway company, coming in here and appealing to the intelligence, or to the reason of this jury and asking them to deduct from the recovery which you give to her the saving to her in the service which she would render to him."

as fully shown by verified report of said counsel's argument hereto attached and by Defendant's Bill of Exceptions No. A1.

[fol. 84]

LXXVI

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel, Mr. Curtis, in his closing argument as follows, to-wit:

"Now listen to it—that you in assessing damages for this woman shall assess them at such sum of money, as if paid in cash at this time will amply and justly compensate her for the loss of the pecuniary benefits. That is the Court talking;" as fully shown by verified report of said counsel's argument hereto attached and by Defendant's Bill of Exceptions No. A 1.

[fol. 85]

LXXVIII

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel, Mr. Curtis, in his closing argument as follows, to-wit:

"The testimony shows according to the figures of the Santa Fe Railway Company, that if he had lived, taking a fair estimate of these divisions of time, or taking a fair division during his life expectancy of his earnings that he would have actually received, about $82,500.00, that is based on calculations of thirty-six years at $2,300.00 a year. They say $1,800.00 and $2,050.00, and then $2,600.00, just reduce that to $2,300.00 and then multiply that by thirty six, and you have $82,500.00. Now then counsel for the Railway Company know that it is the law, and there is nothing controlling whatever, and that the railway Company has no right to say that if we can show you will get six percent on that money that you then are limited in your right to recovery of what that six per cent would be on a basis of an annuity or the present value of that life expectancy;" as fully shown by verified report of said counsel's argument hereto attached and by Defendant's Bill of Exceptions No. A 1.

LXXIX

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel, Mr. Curtis in his closing argument as follows, to wit:

"So the Courts take judicial notice of the fact that there can be no test, as the railway company would have the right to come into Court and say we can pay you a certain sum of money and based on five percent or four percent or six pefcent, and on the basis of your life expectancy, that is [fols. 86-88] all you are entitled to. All that the Court will permit will be for the juries to hear evidence as to the prevailing rates of interest as to life expectancies, as to annuities, as to investment by large concerns, none of it controlling, none of it giving the right to a railway company to have it fixed that way;" as fully shown by verified report of said counsel's argument hereto attached and by Defendant's Bill of Exceptions No. A 1.

LXXX

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel Mr. Curtis, in his closing argument as follows, to-wit:

"The railway company would not have the right to say you can take this money and invest it in liberty bonds and it will make you four percent, or you can take this money and invest it in A. T. & S. F. Ry. Co. Bonds, and you will make three per cent, or take it and invest it in Union Pacific Railway bonds, and you will make four percent. They have got no right to say to you—those being guaranteed securities,—to say to you that this woman is precluded from any amount she should receive by any fixed figure of that kind, but that a jury may only hear evidence of that character, and attach to it such credit and importance as it may see fit;"

as fully shown by verified report of said counsel's argument hereto attached and by defendant's bill of exceptions No. A 1.

[fols. 89-96]

LXXXV

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel Mr. Curtis, in his closing argument as follows, to-wit:

"Now what *does* the Court advise you as to the correct measure of damages? He don't say that you shall render this on a basis of a thirty six year life expectancy, and on the fact that he was making $2,300.00 a year, or would make $82,800.00 during his life expectancy,—that would be on the weight of the testimony. He don't say that you should allow it on the basis of three per cent or four percent or five percent because there is no such rule of procedure that controls a present and honest jury when it comes to assess the measure of damages under the correct rules of law as are shown by the charge which is to guide them in assessing those damages, but what is the chart? It is contained here in the Court's charge, it is the law of the land, it stood the test of the Supreme Court of the United States, and here is what the Court says, and here is what the Court charges you to be the law, "Regardless of what your answers may be to the questions submitted in this charge, you will assess damages, and you will arrive at the amount thereof by assessing the same at such sum of money as if paid in chsh at this time would be sufficient to fairly compensate the surviving wife and shild for such pecuniary loss—what is pecuniary loss; pecuniary loss is not only the money, it is not only the money that he has given to his wife in actual cash during his lifetime, but it is the pecuniary benefits;"

as fully shown by verified report of said counsel's argument hereto attached and by defendant's Bill of Exceptions No. A 1.

[fol. 97]

XCVIII

The verdict of the jury is manifestly grossly excessive in amount and unwarranted by the testimony both as to the amount awarded the wife and as to the amount awarded the child because, dispassimnately and intelligently considered and eliminating t e elements that the law requires to be eliminated, to wit: loss of affection, solace comfort etc., there is no reasonable basis on which the award of this jury to these plaintiffs can be justified; there is no reasonable basis for believing that either plaintiff had a prospect of contributions from the deceased or of receiving pecuniary benefits from deceased figured at a present value that could possibly have aggregated any such amount as was allowed.

XCIX

The verdict of the jury is grossly excessive in amount and unwarranted by the evidence in its award of $16,000.00 to the minor child in this:

That under standard present value tables, figuring money at only three per cent, $14,877.00 paid now would be equivalent of $1,000.00 per year paid annually for twenty years (and under the court's charge twenty years was the maximum for which contributions to the minor could be figured; and figured at three and one-half per cent $14,212.00 would be equivalent of a like payment of $1,000.00 per year for twenty years, and figured at four per cent, $13,590.00 would be the equivalent of $1,000.00 per year payment.

[fol. 98] Therefore the amount awarded this minor under present value tables figured at these very low rates would yield this minor $1,000.00 per year until she reached her majority, an amount at least twice as large as there was any reasonable probability of her ever receiving per year from her father had he lived and continued in good health and worked all the time and received every promotion that was possible, and no other children had been born to the family and both he and her mother had continued in the best of health so that no special drains were made on him or them by extraordinary expenses, and he had taken no vacations, never was sick, etc.

And if high rates of interest are taken, more nearly approximating the rates in vogue in Texas and which, under the testimony, ought to be taken, $12,462.00 is the present value of $1,000.00 yearly payment at five per cent, $11,469.00 the present value at six per cent; and $10,594.00 the value at eight per cent, which figures make more manifest and absolute the excessiveness of this verdict in favor of the minor.

C

The verdict of the jury is grossly excessive in amount and unwarranted by the evidence as to the amount awarded in favor of the wife in this:

That at the low net rate of four per cent, the present value of $1,000.00 per year annual payment for thirty six years would be $18,908.00; at four and one-half per cent it would be $17,666.00; at five per cent it would be $16,546.00; at six per cent it would be $14,621.00; at seven per cent, $13,035.00, and at eight per cent it would be $11,717.00.

So it is manifest that upon a present value basis this verdict practically guarantees to Mrs. Moser an annual income of $1,000.00 for the full expectancy of said deceased Moser, when it is manifest from the evidence there was no reasonable possibility of him contributing to her on her own account much over half that amount and certainly not more than about two thirds of that amount, at any time, and the award as made not only allows her an annual in-[fol. 99] come of from twice to three times what she had any reasonable prospect of receiving from him annually for her own account, but it guarantees to her that excessive annual income for every year of what would have been his maximum expectancy if he had been following one of the ordinary vocations of life and not the extra hazardous vocation of a brakeman; and making no allowance or deduction on account of this extra hazardous calling, and making no allowance for loss of time and earnings from sickness or vacations or rest time, but guaranteeing that he would work all the time and never miss a day; and making no allowance for the ravages of advancing years and their probable effect on his earnings nor for the possibility of other children being born, decreasing the wife's expectancy; nor for the possibility and probability of decrease in scale of wages or his losing his job or having accidents or any of the other ordinary contingencies of life, and making no allowance for the value of the service she would render him had he lived and like matter; the verdict in a word not being figured on compensation at present values but an unwarranted and outside limit guarantees to the plaintiff, Mrs. Moser, of the absolute possible maximum and more that she could reasonably have expected from Mr. Moser had he been exposed to none of the vicissitudes of life that ordinary mortals are exposed to.

CI

The verdict of the jury is grossly excessive and wholly out of proportion to any sum or amount for which the defendant is liable under the law controlling its liability and the measure of damages therefor. That the measure of the defendant's liability is fixed under the Act of Congress commonly known as the Employer's Act and thereunder could not exceed such sum as if paid in cash would fairly compensate the plaintiff for the loss sustained and the amount of such compensation is measured entirely by the contributions which had been made by the deceased for the support of the plaintiff and what would have been such contributions during the probable life of the deceased, [fol. 100] and in determining the questions of future contributions nothing more than the earning capacity of the deceased should be considered, which earning capacity of the deceased is determined exclusively by the salary he had ordinarily received from the defendant in the capacity he was engaged at the time of his death, and as applied to future earnings and the amount of contributions therefrom that the plaintiffs might reasonably expect, the jury was not warranted in considering any element except that based upon the same average wages he was receiving at the time of his death. Measured by these standards, therefore, there was no proper evidence in this record which would no could justify the verdict that was returned. The verdict on its face shows that the jury engaged in a speculation and so speculating, as by the verdict returned, decreed such a sum to these plaintiffs, that is far in excess of any amount to which they, or either of them was entitled under the Act of Congress fixing liability for injuries resulting in death to an interstate employee by a railroad engaged in interstate commerce, and for these reasons, and each of them, defendant avers that the verdict and the amount thereof is wholly without legal evidence to sustain it.

CII

Under the Federal Employer's Liability Act, and the measure of recovery therein for injuries resulting in death, the plaintiffs were and are not entitled to any recovery which would leave a balance at the end of the life expectancy of the deceased. The defendant was liable to the deceased for the monthly wage earned by him and it can only be liable to these plaintiffs for the proportion of such monthly wage which he contributed to their support as well as some additional sum for the care, nurture and advice given to the child during its minority and during his expectancy and when this demand has been met the defendant is and was entitled to an acquittance. The verdict returned herein goes far beyond this and had in effect visited upon the defendant a punishment for an injury [fol. 101] where the element of exemplary or punitive damages did not enter. The verdict is, therefore, grossly excessive and out of proportion to defendant's liability under the above mentioned Act of Congress and relief is herein sought against the inordinate demand as called for by the verdict.

CII.A

The evidence was to indefinite and uncertain and speculative *so* have enabled the jury to find any substancial amount, if any amount as the pecuniary value of the care and training, advice and counsel, the minor child might have received from the deceased and the verdict allowing any amount therefor, or least any substantial amount therefor, could have been based on speculation and conjecture.

CIII

The verdict of the jury herein is wrongful to the defendant and imposes upon the defendants burden not warranted for injuries resulting in death, in that the evidence conclusively shows that based upon any earnings which the deceased had ever given for the support of the plaintiff therefrom, said verdict is grossly excessive and had no evidence based upon anything ever accomplished by the deceased to sustain the amount of it. Such verdict was, therefore, returned upon speculation and upon the assumed hope of a future increase in salary and which might never be received The evidence was and is too indefinite and uncertain, speculative and conjectural to justify the amount of the verdict on any theory of the law applicable to the evidence. The verdict is, therefore, and as to its amount, contrary to the measure of recovery as fixed by the Act of Congress and thereby the defendant has been burdened with a responsibility which has no warrant in the law and as against which the defendant is entitled to relief.

CIV

The verdict of the jury is contrary to the law and the evidence and grossly excessive in amount and shows that the jury wholly disregarded the testimony in the case and [fol. 102] particularly the testimony of the witness Anderson submitting figures on present values at all applicable to the case as made by this record, which figures condemn the verdict of the jury as grossly excessive in this:—

That assuming deceased would have contributed two thirds of his total wages to his wife and child (which is more than he would probably have contributed under the most favorable conditions), and making full allowance for all possible promotion and increase in wages that the evidence shows there was any possibility might have come to him and reducing these contributions to a present value for his full expectancy and a little more, to wit: thirty seven years, even if he had not been engaged in a hazardous occupation, the present value of the money at eight per cent (which the undisputed and uncontradicted testimony shows money can be safely made to earn without cost to the lender in Texas, and has earned for many years in the past) would be $17,446.00; and at seven per cent it would be $19,429.00; and at the rate of six per cent, the very minimum that can be justified as a basis of calculation under the record, would be $21,845.00. These amounts are manifestly excessive in themselves and are too high a judgment and award because no allowance is made for the extra hazardous occupation in which deceased was engaged, and shorter expectancy incident thereto; no allowance is made for the fact that under the charge of the Court, and under reasonable probability as well, contributions as to the minor would cease when she had obtained her majority or in twenty years at the maximum and she was not entitled to her contribution figured for thirty six years; no allowance is made for possible failure of promotion and not only failure to receive increased wages, but also the probability of decrease of wages from war time rates; nor the ordinary contingencies of life such as sickness, rest time and vacation, etc.; nor the probable increase in the size of the family if deceased had continued to live; nor for the fact that the wife and child are relieved of those services that deceased had a right to expect from them and that they [fol. 103] will in the future have the benefit of the time and exertion that would otherwise be so spent; nor the possibility or probability of the remarriage of Mrs. Moser, etc.; and an allowance of the maximum under the Anderson figures at six per cent, $21,845.00 would in itself have been a guarantee to the plaintiff that for thirty seven years two thirds of the possible earnings of said Moser allowing for every possible promotion he could have had, every increase of wages that he could have gotten and without any diminution on account of any of the contingencies of life to which human beings are subject. In other words, a verdict for $21,845.00 can not be justified under the record in this cause, to say nothing of one for $34,000.00.

CV

It is manifest from the verdict that the jury were misled to the defendant's prejudice by the failure of the court to give the various special instructions asked on the question of damages, and manifest that the jury has not reduced the contribution to a present value nor the contributions to the child to twenty years, nor taken into consideration any of the elements in reduction of damages covered by defendant's special charges on the issue of damages, not only so, but it is manifest from the verdict that they have gone beyond compensation to the plaintiff figured at present values and have undertaken to award exemplary damages and to punish the defendant.

CVI

There has been misconduct on the part of the jury in their deliberations and the determination in this cause and their verdict herein resulting from a failure to follow the law.

That the jury did not, as the law requires, reduce or attempt to reduce the amount of probable contributions that might have been made by Moser to his wife and to his child to a present value, and did not in their deliberations and determination of their verdict consider what the amount awarded might be made to earn if placed at interest and in safe investment, as is contemplated by law, and did not calculate or undertake to calculate the value of the con- [fols. 104-152] tributions, all of which this defendant is ready to verify by the examination of the jury.

In District Court of Bell County

[Title omitted]

Defendant's Bill of Exception C—Filed March 29, 1924

Be it Remembered that on the trial of the above entitled and numbered cause while the witness James Harrison was on the stand, and having testified on direct examination on behalf of defendant, *and having testified on direct examination on behalf of defendant*, on cross examination he was asked the following questions by counsel for plaintiff:

"Q. Do you know what the prevailing rates of interest are on government bonds?"

Whereupon the defendant by counsel objected to any proof of rates prevailing on government bonds, on the ground that the rate of interest that would control and prevail in any particular case would be the prevailing rate [fol. 154] in the particular locality, and as to this case, that prevailed in Texas and in this particular section, in Bell County and other places in Texas that might reflect the rate in Bell County. That rate of interest prevailing on government bonds or rates of interest that prevail generally over the country and which are fixed by the prevailing rates in the markets of the world are not relevent and material on the issue in this case as to what is the reasonable value of money in Texas and in this vicinity; people down here don't loan money at small rates of interest; low notes sequrities that are held in the east do not command sale here and their value is not a relevant and material matter in this case and the testimony is irrelevant and incompetent, and is not proper or relevant to show the reasonable value of the use of money in Texas and in this vicinity.

Whereupon counsel for plaintiff asked the witness the following question:

"Q. Do you know whether or not many people in Texas in the last few years have invested in liberty or government bonds?"

Defendant objected to said question and the witness' being permitted to answer the same for the same reasons; which objections were by the Court overruled and the witness was permitted to answer:

"A. Yes sir, I think quite a bit."

Whereupon counsel for plaintiff asked the witness the following question:

"Q. What rate of interest do gilt edge securities of that character bear?"

Whereupon counsel for defendant made the same objections to this question and to the witness' being parmitted to answer the same, and further because it is not shown that the rate sought to be proved was the rate that money bears in Texas and Bell County and in adjacent counties to Bell where this money could be loaned out.

Whereupon the Court overruled said objections and the [fol. 155] witness was permitted to answer:

"A. They vary. I think about three and half from three on up to about four or and a half and perhaps some higher."

Whereupon counsel for the plaintiff asked the witness the following question:

"Q. You are familiar with the fact that on absolute gilt edge security that can be purchased by inexperienced people safely for investment in great volume; those sums of money will loan in that manner at three and a half or four per cent?"

Whereupon defendant by counsel objected to the said question and to the witness' being permitted to answer the same on the same grounds as before stated, and further on the grounds that the question was too broad and general, and the line of inquiry had no application to this case; and the rates of interest sought to be developed were not shown in Bell County. That money is loaned in France in all probability at one per cent but that would have no relevancy in this case.

Whereupon the Court stated "You can have a full bill of exceptions on this question" and overruled the objections. Whereupon the following questions were asked the witness and answered:

"Q. You know that — is true that in large volumes in Texas and other parts of the country on gilt edge securities, it returns three and a half or four per cent?

"A. There is not as much loaned; there is more loaned at higher rates.

"Q. I am asking you if that is true?

"A. Some large investments have been made in Government bonds of course.

"Q. Don't you know that in this country now that on any large loan of real estate that you can get all the money you want at six per cent?

"A. I don't know about that. On choice business property money is had at six per cent."

[fol. 156] Whereupon the defendant by counsel urged the further objections to the said testimony so developed, on the ground that "what you can get money at is not the question; the question is what you can put it out for and what it has been put out for for years; our position is it can be loaned and safely loaned at eight per cent, and defendant objects to any testimony that some other money is loaned at less value as wholly irrelevant and immaterial."

The objections were by the Court overruled and the testimony permitted to remain before the jury, to which rulings of the Court defendant then and there excepted, and at the time objections were made excepted.

That thereafter while the witness C. E. Crain was on the stand after having testified on direct examination in behalf of defendant as shown by the statement of facts, on cross examination the following proceedings were had, the questions being propounded by Mr. Curtis, attorney for plaintiff, and Mr. Lee being attorney for defendant:

"Q. You are a business man, are you?

A. I suppose so.

Q. And know something of the different character of investments made in this country by a man of means?

A. Yes sir.

Q. And you know that the rate of interest which is received depends upon the character of loan and the character of investment?

A. Size of the loan and the security.

Q. You know that loans which are made by the issuance of bonds for a period of time, safe and sound security and on government bonds, and on bonds of big concerns, loans of that kind are made not exceeding four per cent?

Mr. Lee: We object to that question. There isn't any issue involved in this case about rates on bonds or government security. The question in this case is what the money [fol. 157] can be loaned at and made to bring on perfectly good security at this time.

The Court: That is the same question that you raised yesterday.

Mr. Lee: Yes, sir; and I object on the ground that it is wholly irrelevant and immaterial, and too remote, and does not apply to the conditions in the case and the facts of this case and the measure of damage in this case.

The Court: Overrule the objection.

Mr. Lee: We except.

Q. You know that is true, do you not?

A. Yes, sir."

And on recross examination the following proceedings were had:

"Q. Do you know why it is that men of great capital and means who have opportunity to invest their capital in this country prefer to put it on three and a half to four per cent interest instead of loans on town property?

Mr. Lee: We make the same objection. It is purely argumentative.

A. I don't know that they do.

Mr. Lee: I take a bill to the question and answer."

And the defendant by counsel then and there excepted to the rulings of the Court as shown.

Be it further remembered that thereafter while the witness W. W. Thomas was on the stand, and after having testified on behalf of defendant as shown by direct examination, the following proceedings were had, Mr. Lee being counsel for defendant and the questions being propounded by counsel for plaintiff:

"Q. Do you know why it is that men of large capital and means in Texas and elsewhere prefer to invest their capital in 3½ and 4% securities instead of intrusting it to you to loan for them in Houston?

A. I won't admit it.

Mr. Lee: We object to it on the same grounds.

The Court: The same ruling is made as was made a while ago."

To which rulings of the Court defendant then and there excepted. That thereafter while the witness H. M. Anderson was on the stand and after he had testi-
[fols. 158-163]

fied on behalf of defendant as shown by his direct examination, he was asked by plaintiff's counsel to make a statement of present values covering an income of $1,800 for seven years, $2,050 for sixteen years, $2,600 for fourteen years, taking the total earnings and not two-thirds of it, and figuring the rate of interest at four per cent instead of the rates he had figured in the direct examination.

Whereupon defendant by counsel objected to the testimony asked for and to the witness' being permitted to answer and make the figures as asked, on the ground that there is no basis under the testimony in this case that will warrant the figuring of the rate of interest at four per cent; that there is evidence that there is a prevailing rate in this section and that money can be put out at eight per cent safely and on good security, and the attempt to prove figures at four per cent is simply injecting into the case a basis of damages and of evidence on the issue of damages that are not pertinent to the case; that are not relevant or material; that are not predicated on the proper measure of damages, and such is not the way to figure same and the testimony will simply mislead the jury as to the true facts; and further on the ground that there is no evidence in the record that the contribution would be the full earnings of the deceased.

Which objections were by the Court overruled and the witness was permitted to answer that the present values of the amounts stated figured at four per cent would be $42,416.00.

To which ruling of the Court the defendant then and there excepted, and now here tenders its bill of exception No. 6, and prays that same be allowed in terms of law and made a part of the record in this cause; which is accordingly done.

Lewis H. Jones, Judge Presiding.

(Stenographer's Record 23 25 145 147 158 and 163.)

[fol. 164] IN DISTRICT COURT OF BELL COUNTY

[Title omitted]

DEFENDANT'S BILL OF EXCEPTION 6—Filed March 29, 1924

Be it remembered that on the trial of the above entitled and numbered cause while the witness GRAZIER was on the stand testifying on behalf of plaintiff he was asked by plaintiff's counsel.

Q. Can you tell the number of promotions that took place the last five or six years? (referring to promotions from the position of brakeman to the position of conductor in the service of defendant).

Whereupon defendant by counsel objected to all testimony sought to be offered at that time on the question of a promotion, or the probability or possibility of promotion of said Moser or to him, on the ground that the whole [fol. 165] matter was too remote and contingent upon too many circumstances and too many uncertainties and was too vague and indefinite and speculative to be admissible at all, and that it had already been developed by the witness that it might be nine or ten or eleven years before Mr. Moser might have been promoted, and it was not certain that he would be promoted even in that period.

Which objections were by the court overruled, and the defendant then and there excepted.

Whereupon on further examination the witness testified that there were no promotions of brakemen in 1922, and in 1921 there were ten promotions, and in 1920 there were five promotions, and in 1919 there were none.

Whereupon defendant urged the further objection to this line of interrogation of the witness and to the testimony offered that it was too vague and indefinite and involved too many uncertain matters, going back in the past and picking out particular promotions in particular years where the conditions were not shown. Whereupon the court asked "Is that the same line of service?" and the answer being Yes, the court overruled the objection and permitted the line of interrogation to continue, to which defendant then and there excepted. And thereupon the witness again testified that his records showed there were five promotions in 1920 and ten in 1921; that in 1922 there were none.

Whereupon he was asked how many conductors are carried on the roster so that if a conductor would drop out a brakeman would be promoted to conductor.

Whereupon defendant reurged its objection to this line of testimony, with the further objection that the dropping out of a conductor would be contingent upon too many circumstances and conditions and would be too vague, speculative and uncertain. The court overruled defendant's objection and the witness continued to testify that there showed to be eighty eight conductors carried on the roster of all kinds, freight and passenger.

[fol. 166] "State whether or not you keep that list and roster and whether or not it is the rule and custom of your company, the Santa Fe Railway Company, where a new position of conductor is to be created or a vacancy exists, that the first man up for promotion is entitled to it according to the rules of your company?

A. The first man in order of promotion is entitled to promotion provided he can stand the examination."

Whereupon defendant renewed its objection to the line of testimony offered on the further ground that there was no evidence that Moser could have stood the examination, and that he would have passed the same was contingent and uncertain and may not have happened, which objections were by the court overruled and the testimony objected to was permitted to stand before the jury.

That thereafter said witness, examined by plaintiff's counsel, further testified as follows:

By Mr. Curtis:

"Q. State whether or not a brakeman gets his education and experience fitting himself as a conductor?

A. A man's length of service would give him the experience for a conductor.

Q. Did you know Mr. Moser personally?

A. Yes sir, I did.

Q. Do you know his character and habits with reference to his being experienced in his line, and his faithful discharge of duty in the service of the company?

A. As far as I know, Mr. Moser was a fairly regular worker.

Q. And competent in his line?

A. Yes, sir, he was as far as I know competent as a brakeman.

Q. Are you familiar with the different rates of pay between the brakeman's position and conductor's position?

A. Not entirely familiar, but fairly familiar with some of them.

Q. What is that, what is the difference?

A. I will give it to this extent, we have what we call the local rates, the through freight and then we have the work [fol. 167] train, mixed and passenger service. Now the rates that apply to those, I can't give them off hand.

Q. Isn't it true, if a brakeman were making say $2,000.00 a year the conductor would be making about $3,000.00?

Mr. Lee: We object to the question, because it is leading, and because it don't call for what they would make, it only calls for about.

Q. Well, approximate the difference in pay between a conductor and brakeman. Of course all brakeman don't make the same, but if a man would do the same service, in other words, if Mr. Moser had been a conductor and had done the same time as he did as brakeman on the train, what wages would he get?

A. I would say probably $400.00 to $500.00 a year.

Q. Do you know the difference in the mileage they get paid?

A. Not exactly."

And defendant then and there excepted to the rulings of the court as above shown.

That thereafter on recross examination the following proceedings were had, Mr. Lee being counsel for defendant:

Q. You were asked about Conductor Boren. I understand he was employed as conductor.

A. Yes sir.

Q. Can you hire a man now in these days?

A. We have the privilege of hiring a man for every third man promoted.

Q. So you can hire men from the outside?

A. Yes, sir, we can hire men if desired.

Q. Now I will ask you to state to the jury whether promotions are as rapid in railroad service now as it was in 1913 and in 1909?

A. It is not.

Q. It is very much slower than it was then?

A. Quite a difference in the promotion.

Mr. Lee: I move to exclude all the testimony as to pro- [fols. 168 & 169] motions in the light of cross examination and redirect examination on the same grounds stated before, it is too general, vague, speculative and remote and uncertain.

The Court: Overrule the motion.

Mr. Lee: We reserve a bill."

To which rulings of the court as above shown defendant then and there excepted and now here tenders its Bill of Exceptions No. 6 and prays the same may be allowed in terms of law and made a part of the record in this case, which is accordingly done.

Lewis H. Jones, Judge Presiding.

Stenographer's Record 32 33 34 36 and 52.

[File endorsement omitted.]

[fol. 170] IN DISTRICT COURT OF BELL COUNTY

[Title omitted]

DEFENDANT'S BILL OF EXCEPTIONS 7—Filed March 29th, 1924

Be it remembered that on the trial of the above entitled and numbered cause while the plaintiff W. J. Bassett was on the stand testifying on behalf of plaintiff, the following proceedings were had, Mr. Curtis being attorney for plaintiff and Mr. Lee being attorney for defendant:

"Q. Do life insurance companies sell annuities based on certain rates of interest?

A. Yes, sir.

Q. What would be the cost of an annuity for $1,800 a year, for a person twenty eight years of age?

Mr. Lee: Just a minute, we object to any testimony as to what would be the cost of an annuity from a life insurance company, because it would be nothing but a purchase of insurance for so many years, and a guarantee that a certain sum would be paid; would be a guarantee that the particular party would continue to live and be always employed and would make that much; would be in effect purchasing an insurance policy payable in annual installments, and, further, because it involves a profit to the company that would sell it and there is nothing to show how much that profit would be; and it necessarily involves a calculation of the money value of the principal sum that is to be paid for the annuity at some rate of interest but what that rate of interest is does not appear, nor whether it is the rate of interest that prevails in Bell County and adjoining counties; and because what would be required to purchase an annuity in New York as sold by an insurance company operating with large sums of money in the markets of the world is not a relevant circumstance on the question of what money is worth in Bell County, or in [fol. 171] Texas, and what it can be loaned for here; and it is all irrelevant and immaterial and misleading to the jury, and is calculated to prejudice the cause of the defendant."

Which objection was by the Court overruled.

Mr. Curtis: You may answer the question.

A. At what rate of interest?

Q. Say at four per cent——

Mr. Lee: We make the further objection because it is predicated on a rate of interest that is not shown to be the rate of interest in this county or in this section of the state."

Which objections were by the Court overruled, whereupon the following further proceedings were had:

"The Court: Answer the question.

A. The present value of the annuity of $1.00, the first payment to be made at once, according to the combined experience and American Experience Tables of mortality at the age of twenty-eight years, would be $18.36 at four per cent.

Q. Would be how much?

A. $18.36. To arrive at the value of an annuity of $1,800, multiply $18.36 by $1,800.

Q. If you were to purchase an annuity of $2,000 a year, the $18.36 would be multiplied by $2,000?

A. Yes sir.

Q. If you would buy an annuity at $2,400.00 a year, you would multiply the 18.36 by $2,400.00?

A. Yes, sir.

Q. Mr. Lee: Your Honor understand our objection goes to these additional questions?

The Court: Yes, sir.

Q. Based on $2,000.00 a year at $18.36, that would be $36,720.00.

[fol. 172] A. Correct.

Q. That is a mere matter of calculation. 18.36 an annuity of $3,000.00 a year would be how much?

A. $55,080.00.

Mr. Lee: We object to that on the further ground that there is absolutely no basis in the record for a $3,000.00 calculation. There is no testimony that warrants any finding that he ever would have made any $3,000.00 a year. And we make this further objection to all these calculations that none are predicated upon any contributions upon the part of this man, but are predicated in so far as they have any basis in the testimony as to his gross earnings, and therefore the whole thing is irrelevant and immaterial, and not confined to the proper measure of damages.

The Court: Overrule the objection.

Mr. Curtis: I believe you state an annuity of $3,000 a year on a basis of recognized and standard tables would be $55,080.00?

A. Yes, sir.

Q. That four per cent would be the rate of interest without reference to any other charge, expense, taxation or any other charge?

A. Yes, sir.

Q. Straight mathematical calculations?

A. Yes, sir.

To all of which rulings of the court in permitting the testimony as above shown, defendant then and there excepted, and now here tenders its bill of exception No. P and prays that same be allowed in terms of law and made a part of the record in this cause; which is accordingly done.

Lewis H. Jones, Judge Presiding.

[File endorsement omitted.]

(Stenographer's Record, pp. 66-67-68.)

[fol. 173] IN DISTRICT COURT OF BELL COUNTY

[Title omitted]

DEFENDANT'S BILL OF EXCEPTION XX—Filed March 29th, 1924

Be it Remembered that on the hearing of the motion and amended motion for new trial in this cause on the third day of January, 1924, defendant called and examined J. J. Miller, T. E. House, M. L. House, J. E. Hudson, J. Y. Moreland, E. W. Dunlap, R. N. Cass, R. H. Giles, and J. F. Dubose, members of the jury who sat in this case and rendered the verdict herein, in support of its motion for new trial and its second amended motion for new trial, specially in support of the CV, CVI and CVII grounds of said amended motion, and said jurors being duly sworn and examined by defendant, testified as follows:

J. J. MILLER testified:

I was one of the jurors in the Moser case. On the first ballot for verdict I was for $30,000.00. As to how I arrived in my own mind at the $30,000.00, as a basis for verdict, I made calculations on what he was drawing at the time of his death, $1,800.00 a year, and I split that in two, about half for his expenses, and then I cut it down and thought $30,000.00 would be about proper.

Q. Do I understand you took his expectancy at thirty-six and multiplied that by $900?

A. Half of $1,800. That makes about $32,000.00, and I lopped it off and made it $30,000.00. That is the basis on which I arrived at that verdict. I did not figure any rate of interest on the use of money, in making that finding, and did not attempt to reduce it to its present value at all.

I could not, from what the other jurors said in the jury room, say whether they followed about the same process I did. I don't know whether they did or not. After final discussion I agreed to a verdict of $34,000.00. The jury [fol. 174] arrived at that verdict just like any other jury, had propositions coming and going, give and take propositions.

The matter of attorney's fees was mentioned but it was stopped, wouldn't let it be discussed. One man asked what the attorney's fee would be, and someone said it would not be allowed to be discussed, and that was all that was said. I myself, did not take into consideration the matter of attorney's fees. My process was taking $1,800.00 as his earnings, as shown by the testimony, and I figured he would spend half of that on himself, and I took the other $900.00 which he would contribute to his family, and took thirty six years, his expectancy, and multiplied that together, and that netted about $32,000.00, and I lumped it off at $30,000.00. I made no attempt to reduce it to a present value.

Cross-examination:

I tried to listen to all the evidence in the case; and after hearing all the testimony I undertook as best I could under the court's charge to allow in damage what I thought the parties were entitled to receive, and I took nothing into consideration outside of the evidence in doing that.

T. E. House testified:

I was one of the jurors in the Moser trial. On the first Ballot I voted for $35,000.00 damages. As to how I arrived at that in my own mind, as I understood the charge of the Court it charged us to issue this lady a certain amount of money which would be sufficient to support her and her child, and I felt it would take that to support her for thirty six years, and a fraction over. I forgot exactly what figures were the basis of my calculation—something like $900.00 per year, allowed a little over that, something a little better than $1,000.00; it would be on a basis of $1,800 a year or a [fol. 175] little better than that possibly. I allowed the widow and child a little better than half, possibly, of what he earned. I don't know exactly how much; I never kept any record of it. I figured $1,000.00 a year for thirty six years would be $36,000.00, and I knocked it down to $35,000.00 and that is the way I arrived at my first ballot. Six jurors were for $30,000.00 and five for $40,000.00 and I was in between, $35,000.00.

I did not undertake to figure what interest the amount of money I allowed would bear; I did not understand the charge that way. I was just to find out the sum, the amount of contribution he would probably make during the years; that was the way I understood the charge. And that is what I did in arriving at the verdict, what under the law I thought it was my duty to give her; that is the way I got at it. I finally agreed on $34,000.00; I made one change only, from $35,000.00 to $34,000.00.

I could not tell you how many ballots were taken; there were several. In between the ballots there would be a discussion among the jurors about how to arrive at the verdict. That was about the same method the other jurors were apparently using, several I know—multiplying the contribution by thirty-six years, his life expectancy, and endeavoring to arrive at a verdict in that way. Some differed as to what figure they would take as annual contribution, but everyone was using that same method as far as I know. In arriving at $34,000.00, this discussion backward and forward about what were the correct figures to use, that brought some men up and some men down, and we got at the $34,000.00 verdict in that way. As far as I was concerned, I took the annual contribution and multiplied it by thirty-six years; that is what they did also, as far as I heard and observed.

There was nothing said about attorney's fees that I recall. I was not influenced in any way by attorney's fees.

I did not undertake to use any six per cent or seven or eight per cent interest, to reduce the amount of my verdict [fol. 176] to a per cent value; I did not understand it was my duty to do so under the Court's charge.

Cross examination:

I listened attentively to all the evidence in this case, and to the Court's charge; and under the court's charge and under the testimony I undertook to give indemnities to the amount I thought plaintiffs were entitled to receive. I did not use figures, only in my head; some of the men did. I did not write down any figures and undertake through a process of mathematical calculation to arrive at the correct figure; but after listening to all the testimony and considering the court's charge I undertook to allow what I thought they were entitled to recover. I do not know what mental process each of the other jurors had in arriving at the figures and the amounts they were for.

Redirect examination:

In my own mind I figured a contribution of $1,000 for thirty-six years would amount to $36,000.00 and I just knocked $1,000.00 off that and rendered $35,000 as my verdict.

M. L. House testified:

I was one of the jurors in the Moser case. On the first ballot I was for $40,000.00. I figured it would take that much to support this woman and support this child and educate this child. I figured from what Mr. Moser was drawing how much he would be able to give per year. I figured it at $1,800.00 per year he would accumulate that much money, some more than that much. I did not multiply $2,300.00 by thirty-six, the number of years. No one else on the jury, that I know of, multiplied it. I did not figure if Mr. Moser had lived how much of his earnings he would spend on himself—not half hardly, I think that his contribution would be more than $900 per year probably; I don't know that I figured what his contribution would be a year. [fol. 177] I don't remember to have heard the figures mentioned that at $1,000 for thirty-six years, his expectancy, he would have contributed $36,000.00.

I did not figure it that way at all. I figured according to the Court's charge what it would take to support this woman and educate this child.

Q. It did not make any difference with you whether he would have been able to have made that much a year or not, you just figured how much it would take to support the widow and the child?

A. Yes sir.

I did not figure how much Mr. Moser would have contributed to Mrs. Moser at all; that was not in the Court's charge. I figured Mr. Moser would have been able to have furnished them a living and educate the child.

I remember that in Mr. Curtis' argument he referred to the fact that $2,300.00 a year (an average of his earnings) if he had been promoted) multiplied by thirty-six years (his life expectancy) would make $82,500.00. I did not split that half in two and just figure he would spend that amount on himself, I did not figure that way. I figured it would take that much to support this woman and child.

I did not figure any rate of interest that $40,000.00 could be made to make, did not figure it at all. I just figured out in my own mind how much it would take to educate his daughter and take care of his wife, and added them together. I did not try to figure it down to see what she could make out of it. I did not take into consideration any earning capacity the money would bring; I just figured what it would take to support this woman and child; that is, if she had drawn from year to year out of the money that was given to her. That is the way I arrived at it.

In reaching this amount I did not hear anything said with reference to attorney's fees; attorney's fees were not mentioned as far as I know of at all.

Cross-examination:

After listening to all of the testimony in the case, under [fol. 178] the court's charge as I interpreted it, I undertook according to my best judgment to allow just what I thought the plaintiff was entitled to receive, and no more. I did not undertake in coming to my conclusions, anything further than a general consideration of all the evidence in the case and the court's charge; I did not undertake by mathematical calculation to figure it out for myself. The Court did charge us that we should allow to the plaintiffs such an amount as if paid at this time would compensate for the loss they had sustained by reason of his death. That is the way I tried to arrive at it, and I thought they were entitled to $40,000.00.

There was nothing discussed by the jury outside of the evidence and the Court's charge in our deliberations, that I know of. No discussion was made of any expense to which the plaintiff would be by reason of litigation; and no discussion was made as to reaching verdict by lot or by adding up and dividing what the jurors were for by twelve. The jury was unanimous on each of the issues submitted to them in deciding each question just as they were answered except just as to the amount, and we did all that first; and every man on the jury was in favor of answering each question as it was answered and presented by the court except when we came to fixing the amount of damages, and on the subject of amount the jury took a ballot merely; we entered into no mathematical calculations but took a ballot as to what each of us thought they were to receive. On the first ballot, without any attempt by the jury to make any mathematical calculation, each juror merely wrote down what verdict he was in favor of. Six of the jurors were for $30,000, one for $35,000, and five for $40,000. At no time did the jury enter into any mathematical calculations figuring rates of interest or the values of annuities or discuss any particular evidence along those lines, but we fixed these amounts and finally got together on $34,000.

Redirect examination:

What figures the other jurors may have made in their [fol. 179] own minds I don't know anything about. There was no figuring done in the jury room, only what I did, that I know anything about. There was one man talking a little about calculations. He reconsidered his ballot on the first ballot and decided he had it a little too high after he had studied about the matter and looked at the figures we carried with us and the Court's charge. There were a few sheets of paper that were sent up with the jury that had Mr. Moser's time on it.

No calculations were made by anybody that I know of, figuring what rate of interest money would earn and reduce it to its present value.

Recross examination:

I undertook according to the best light I had before me to return a just verdict under the evidence and the court's charge.

J. E. Hudson testified:

I was foreman of the Moser jury. On the first ballot I voted for $30,000.00. As to how I arrived at that amount in my own mind, I sorter figured on the basis of what the man was receiving at the time of his death, $1,800 per year. I do not know what his contribution would be out of the $1,800 to his family; I did not figure that; I just allowed so much for his pro rata part and I don't remember just exactly what I allowed for that. What he expected to get is what I rendered my decision.

I thought he would give two-thirds of the $1,800 to the family, something like that; about $1,200.00 per year to the family, and I multiplied that by thirty-six, his expectancy, that is the way I kind of figured it, I don't know that it was just on that basis of figures. $1,200.00 by thirty-six years would be $43,200.00 and I just lumped it off roughly at $40,000.00. Without being accurate as to details that was the process I went through.

I don't know that I figured on about what any amount [fol. 180] of money would earn.

Q. You just figured an amount that would be put in the bank and could be drawn from year to year, considering that as his contributions of money to his family?

A. I took into consideration what he made.

Q. A sum that could be drawn out without regard to anything being put out at interest at all, which would make up what he would have been able to contribute to his family if he had lived, that is the *idea*?

A. I believe it was.

Q. You did not figure what the worth of the money was or what it would bring at interest?

A. I figured what he would have, what would be the sum of his contribution to his family for thirty-six years. I don't know that I took into consideration what that particular sum might earn at any rate of interest.

I was foreman of the jury and I heard the discussion of the jury. The process I went through, something of that kind, was about the process of all the jurors that I heard. I did not hear all of them. The jury generally were considering that same line of calculation but probably not using that same amount; the majority was finding a verdict by multiplying some sum by thirty six and some odd years.

In the discussion after the first ballot we finally got together on $24,000.00.

I don't remember any discussion in regard to attorney's fees. I did not make any arrangements as to attorneys' fee, and as far as I know the jury did not.

Cross-examination:

I listened to all of the evidence and the court's charge as best I could, and undertook according to my best judgment to return a just verdict considering that. From such impression as the evidence made on my mind I undertook to give to the plaintiffs such an amount as they were entitled to receive under the evidence. I did not go through any process of making any mathematical calculations by figures, and I don't know that any of the jurors did that. [fol. 181] When we first went out to consider our verdict we first took up the answering of the questions asked by the court, and the jurors were unanimous as to everything except the amount. When we came to the question of amount we made no mathematical calculations based on any certain figures or lines of testimony, but as jurors merely set down on a piece of paper what each one thought the plaintiffs were entitled to receive under the court's charge. That is all I know about it; and when that was done there were six members of the jury voting for $30,000, one for $35,000, and five for $40,000. We finally got together by deliberation and arrived at a total sum of $34,000, and so far as I know the jury in the jury room undertook to make no mathematical calculation or deductions according to the rules of life expectancy or annuities. There were no discussion or consideration by the jury as a whole, or by any member of the jury, to arrive at a total verdict by making mathematical calculation based on any particular line of testimony but each of us, as far as I know, were for the respective amounts, for which we stood based solely upon the evidence and the court's charge

Recross examination:

I made no calculations to reduce the payment to its present value, and I know of no calculations being made by any members of the jury at any time with reference to any rate of interest to reduce the payment to its present value.

Redirect examination:

I knew that his total earnings, from the testimony, would have run up to more than $80,000, based on $2,500.00 a year; and I was merely trying to arrive at the present value paid in hand in cash at the time of the pecuniary loss which they had sustained, under the court's charge.

Recross examination:

I made no calculation whatever as to what money paid at [fol. 182] this might be made to earn.

There was a question asked in the jury room about attorneys' fees and objected to, but it was not discussed.

J. Y. MORELAND testified:

I was on the Moser jury. On the first ballot I voted for $30,000. As to how I arrived at that, I figured it would take something like that much to give the woman and child support, of course taking into consideration the salary the man was drawing. $1,800 a year I believe was what was figured. I don't know that I went into the details and figured out how much he would contribute to his family. I considered something like $900 a year for thirty-six years. I think I figured that $1,800 for thirty-six years would be about $64,800.00, and cut that about half in two, something like that, and in round numbers I voted for $30,000.

After further discussion by the jury back and forth, I finally agreed to the verdict of $34,000, $4,000 more than my original estimate.

I don't know if the balance of the jury were figuring the matter the same way I was—what he contributed multiplied by thirty-six. They talked on the figures that you all had made out and figured on that sum. I don't know whether they figured what that money could be made to bear interest per year and reducing it to its present valuations; I did not go into those details. I did not figure it at seven or eight per cent or any other rate that the money could be made to bear.

I remember talking to Mr. Draughon about this matter. I told him that the jury did not take into consideration interest rate or attempt to reduce the prospective of the money to its present value. The jury figured some on [fol. 183] some of the papers that were there. I don't remember whether I took into consideration the interest rate or attempt to reduce the prospective contribution that deceased might have made to its present value. I brought in my verdict on a basis that he would have made about sixty odd thousand dollars. I did not figure it in the light of what he would give to his family out of that every year which if kept in the bank and given the same amount every year could have been given for thirty-six years. I had an idea what that money would earn—$30,000.00 a year, I knew it would earn $1,800 at six per cent. I did not figure what amount, if paid now, taking $900.00 as a basis per year, if put out at interest would absorb itself at the end of thirty-six years.

Cross-examination:

When the jury went out after listening to all the evidence and the court's charge, we first answered each of these issues and questions which the court submitted to us, and the jury was unanimous in answering each question as it was answered on the first ballot, except when we came to the amount.

When we came to the amount, instead of entering into a discussion and making mathematical calculations, each of the jurors, taking into consideration the evidence and the Court's charge merely wrote down on a piece of paper the amount which he individually thought the plaintiffs were entitled to receive, and some were for $30,000 six jurors; one for $35,000, and five for $40,000.

We took several ballots on various amounts between $30,000 and $40,000, and we finally agreed on $34,000.

The way in which I reached in my own mind what plaintiffs were entitled to receive, was that I considered the evidence relating to how much the deceased was earning and his life expectancy; and according to my figures that would run up to about $64,000, and I thought to pay this at this time a reasonable award to plaintiff and was the amount I was for. I did not take a piece of paper and do any figuring, nor did the jury as a whole arrive at its ferdict by means of any such calculations. We merely arrived at a verdict by each man writing down on a piece of paper the [fol. 184] amount he was for, ranging from $30,000 to $40,000, and we finally got together and agreed on $34,000.

There was no discussion in the jury room that we should take the respective amounts, add them together and divide them by twelve to arrive at our verdict, and we did not do that. There was no discussion in the jury room that we should give to his wife and child what he would have made in his entire life. There was no discussion in the jury room that we were to allow at this time only one-half of what he would make to his family and allow that all at this time without taking into consideration its present cash value. We merely arrived at our verdict by agreeing on $34,000 after discussing several different amounts under the testimony and under the charge of the court.

Redirect examination:

I don't know what methods of calculations the other jurors used in arriving at their verdict.

Q. You do know that the first ballot you got was the one you arrived at in the manner I have gone over with you?

A. $30,000.

The question of attorneys' fees was not discussed in the jury room; there might have been something mentioned about it. I asked some question about it myself; I believe I asked what was the amount usually paid, something like that. There was nothing else said about it. I did not consider that the widow would have to pay attorney's fees in determining my verdict.

E. W. Dunlap testified:

I was one of the Moser jurors. On the first ballot I was for $30,000 verdict. As to how I arrived at that amount in my own mind as a proper amount, I just figured that it would about take that to do what the judge said for us to [fol. 185] do. The charge said to give her a sufficient amount of damage to educate the child and support Mrs. Moser, and that is what I undertook to do when I first thought of $30,000 as my vote Mr. Moser's earnings and what he would make did not have anything to do with it. I might have made some calculations in my mind as to how much he might be able to contribute to her; I don't know that I remember now just how I did figure that.

I did not make any calculation of the amount he would contribute each year and multiply that by his expectancy. I did not at that time undertake or try to reduce annual payments of so much per year by means of contributions each year to a present value by figuring how much money that money could be made to make. I did not figure that at six per cent or seven or eight per cent or any other per cent; and I did not make any effort to reduce the payment for thirty-six years, his expectancy, to a present value at all.

Cross-examination:

I heard the evidence that was offered, and after hearing and considering it according to my best understanding I undertook to allow as damages such an amount as I thought plaintiffs were justly entitled to receive. I cannot at this time undertake to recall the exact words of the charge, but I heard it, and we had it with us, and I undertook to be guided by it; and under the court's charge and the evidence I was for $30,000.

Every member of the jury voted unanimously in answer to every question submitted except on the question of amount, and when we came to that we voted it verbally. I voted for $30,000 and so did five others; one voted for $25,000, and five voted for $40,000. We did not even write down our respective amounts on paper.

Q. And you arrived at your verdict by taking into consideration what the man was earning and what he would probably earn during the remainder of his life and what would justly compensate these plaintiffs for the loss sustained by his death, under the court's charge?

A. Now, in arriving at the $30,000.00 the charge did not say anything about taking into consideration what this man was earning or about what he would earn, as well as I re- [fol. 186] member about it, the charge just said to give her enough damages to educate the child and take care of Mrs. Moser. That may not be the words, but I think that is the substance of the charge. * * * I understood we should take into consideration what he was earning and should pay them at this time what would justly compensate them for the pecuniary loss they had sustained. I did not undertake to give to them what I thought he would contribute to them during his entire life if he had lived, but to pay them at this time what would justly compensate them for the loss they had sustained.

Redirect examination:

I did not undertake to reduce the amount that I would give them to the present value or figure interest on it at all. I made no such calculation as that and did not try to do it.

Those tables that were used in evidence were up there, but we did not find them *some little but* after we were in the jury room. As to whether any such calculations were made by any juror, I don't know about that. There might have been one made, but I did not make any. As to others I don't know about that; all that I can say is what I did.

Recross-examination:

Q. In other words, after hearing all of the evidence and the Court's charge, you thought they were entitled to receive $30,000 and voted for that, and you undertook to make no particular mathematical calculations yourself?

A. No, sir.

R. N. Cass testified:

I was one of the jurors in the Moser case. On the first ballot I was for $30,000. As to how I arrived at that amount, it would be a little hard to say. You lawyers each thought we ought to find this and the other for that, and we tried to make it fair for both and make it a decision.

Q. Just took an average between Mr. Curtis on one side [fol. 187] and Mr. Hair and I on the other?

A. That had some weight.

We figured on what Mr. Moser was earning; we figured on how much Mr. Moser would make in thirty six years, his expectancy. You remember you lawyers figured how much that would come to and made those figures and we had them. We did consider how much he might have contributed each year to his wife and child, and as near as I remember it, multiplied that by thirty six years that he had to live. I don't know that I at any time figured on that money as to what it would earn so as to reduce it to a present value; I did not make any calculation at interest at eight per cent or six or seven per cent. I made no attempt to reduce the payment paid annually to a present value—to calculate how much if paid now would amount to the same as a payment made each year at a given rate of interest.

Q. You made no such calculation as this insurance man made on the stand, you did not try to do it?

A. The others figured it and I tried to keep up with it as best I could. Interest was mentioned, all right; I don't remember that I saw any calculations made on any rate of interest.

I think I heard the matter of attorneys' fees mentioned in the jury room once, and then it was hushed up at once.

Cross examination:

After listening to all the testimony and the Court's charge, according to my best judgment I was of the opinion that these plaintiffs were entitled to receive $30,000 on my first ballot, merely taking into consideration the evidence as I had heard it and the impression it had made on my mind. I figured that under the Court's charge they were entitled to receive what I voted for on my first ballot. I did not undertake to make mathematical calculations. I am not very good at figures, and I did not attempt it; I don't suppose I could have done it if I had tried, in a scientific way.

The jury when it came to vote on the question of the amount took a ballot, each juror took a vote and gave the amount which he was in favor of allowing; and there were [fol. 188] six for $30,000, one for $35,000, and five for $40,000. We took other ballots, and finally agreed on $34,000.00.

As far as I know there was no misunderstanding of the jury in anyway, or misconduct of the jury, or any discussion of any improper matters.

R. H. Giles testified:

I was one of the jurors in the Moser case. On the first ballot I was for $40,000. As to how I arrived at $40,000 I just figured it would take that much to maintain this woman and educate that child. I believe the man would have done it, had he lived.

I remember Mr. Curtis' statement and argument that

$2,300.00 per year was an average of his salary, and for thirty-six years would amount to $82,500.00.

I did not take any amount of contribution and multiply it by thirty-six in arriving at any amount he might receive. My verdict was a kind of an estimate of what I thought it would take. The charge of the court was that we would give this woman an amount that would maintain her and this child, and that is what we undertook to do. I considered that he would have contributed to his family about half of his income anyway, and multiplying that by thirty-six would be something around $40,000, more than that; that is about the way If figured it in my mind. Wasn't anything said about interest, and I did not attempt to reduce it to a present valuation.

I don't know anything about what is the usual attorneys' fees in a case of this kind. I did not take into consideration the attorneys' fees the widow would have to pay; I did not think about it. I did not tell Mr. Draughon that I was sure that a number of the jurors considered the attorneys' fees in arriving at the verdict. I did not make any such statement as that.

Cross-examination:

[fol. 189] I listened to all the evidence in this case and undertook according to my best judgment to return a verdict under the evidence and the court's charge which would be a just verdict. As far as I know there was no misconduct of the jury or any discussion of improper matters. After hearing this evidence and considering it all according to my best understanding I was for $40,000. I did not undertake to say in my mind that because he probably would make $80,000 or more during his lifetime that she would be entitled to receive that all now; I was merely undertaking to give his wife and child that amount that would compensate them for his death, for their pecuniary loss, as the court charged us.

J. F. Dumon testified:

I was one of the jurors in the Moser case. On the original ballot I was for $40,000 I believe. As to how I arrived at that, I just had an idea it would take that much to keep Mrs. Moser and the child up.

I did make calculations in my head; the charge says that we were to do that and I believe Mrs. Moser, the way the present living was, that it would take $40,000 to keep Mrs. Moser and the little girl up and educate the girl. That is the way I arrived at it as near as I can tell you now.

I did not figure any interest because the charge did not say so. I don't believe I did figure any interest. I figured it was like this: that it was Mrs. Moser's business after the money was paid to her to do as she pleased with it and I thought if she wanted to put it out at interest it was her business, the charge said to give her in a lump what was to keep her up and that child, that is the way I understood it. I made no allowance as to what that money could be made to earn; I did not consider it that way.

[fol. 190] Cross-examination:

I listened to all the testimony that was offered by plaintiff and defendant. I heard the testimony as to the probable life expectancy, and the testimony as to his earnings, what he had made in the past and what he would probably make in the future.

Q. According to your best judgment, of course you don't recall the exact words of the court's charge, but if the court charged you that you should allow to Mrs. Moser at this time such an amount in damages as if paid at this time would justly compensate her for the pecuniary loss sustained by her at the time of his death, is that what you tried to do?

A. I tried to do according to the court's charge.

I did not hear any discussion of the jurors as to any mathematical calculations that were made by which they undertook to figure rate of interest of life expectancy or annuities or anything like that; if it was discussed I did not hear it.

After the jury retired to deliberate on the case all the questions submitted by the court were answered unanimously except the last question, the question of damages; and when we came to that I believe the jury voted six for $30,000 one for $35,000, and five for $40,000. After deliberating together and taking votes on other amounts we finally agreed to give her $34,000.

As far as I know there was no misconduct of the jury or any discussion of any improper matters.

And said testimony in said motion having been considered by the court, said motion is in all things overruled, to which ruling of the Court the defendant then and there excepted, and here now tenders this its Bill of Exception No. XX and prays that it be allowed in terms of law, which is accordingly done.

Lewis H. Jones, Judge Presiding.

[File endorsement omitted.]

[fols. 191-222] [File endorsement omitted]

In District Court of Bell County

[Title omitted]

Order Overruling Motion for New Trial—Filed January 3, 1924

This day coming on to be heard the defendant's amended motion for a new trial filed January 3, 1924, and amended original motion for new trial filed herein on the 10th day of December, 1923, the amended motion having been filed with leave of the Court, and the testimony of the jurors offered in support thereof being considered by the Court, the said motion was in all things overruled, to which ruling of the Court, the defendant in open Court excepted and gave notice of appeal to the Honorable Court of Civil Appeals for the Third Supreme Judicial District at Austin. And on motion of defendant for good cause shown, ninety days from and after this date is allowed to parties for the filing of statement of facts and bills of exception.

Lewis H. Jones, Judge 27th Judicial District of Texas.

[fols. 223-225] Clerk's certificate to foregoing manuscript omitted in printing.

[fol. 236] IN DISTRICT COURT OF BELL COUNTY

[Title omitted]

Statement of Facts—Filed in District Court March 29, 1925, in Court of Civil Appeals April 3, 1924

CAPTION

Be it remembered that on the trial of the above entitled and numbered cause, at the October Term of the District Court of Bell County, Texas, A. D. 1923, the following testimony was offered and the facts presented, and none other, towit:

Mrs. OLESA MOSER, administratrix, in her own behalf testified:

I was the wife of John H. Moser. We were married October 4, 1918; he was then working for the Santa Fe as brakeman and had been about five years.

He was killed April 23, 1923.

He left home about noon on the day of his death to go out on thirty seven to Bellville Yards. Mr. Francis was conductor of the train.

I heard he had been hurt about six o'clock in the afternoon, and that he was dead about seven.

When off duty Mr. Moser was in the habit of staying at home. He loved his baby and loved to take her around, and loved to stay at home and help me.

He had no bad habits.

When off duty in Temple he always stayed at home with the baby. He was always called at home.

There was delivered to me what was supposed to be a part of the floor that my husband went through when he fell through the car; the portion handed me was made of some kind of metal; it was very rusty; worn away.

It was given to me in Valeta by some trainman; if I remember right it was Mr. Ferguson, or he gave it to some one who gave it to me.

(Witness is handed photograph Exhibit No. A of the car involved, taken after the accident, and at this point photographs Exhibits A and B and C were offered in evidence and exhibited to the jury.)

[fols. 237 & 238] Mr. Moser and I had one child, the baby here, Mary Virginia. At the time of her father's death she was a little over seventeen months; she is about two years old now.

At the time of Mr. Moser's death he was twenty-eight years old; I was twenty seven, and we resided at Temple.

Cross-examination:

I was raised in Bosque County at Clifton; my father is Mr. C. O. Nelson; he runs a hotel at Clifton, and has been running it about twelve years I reckon. My mother is living, and I have two own brothers and two half brothers living; two of them live in Clifton, one is a small boy at home with mother, younger than I, and the older one is working here in town; he is now about thirty two. One of the other brothers lives at home and the other lives in Oklaoma. He is working on a salary.

I have two sisters living, older than I, married and living way from home.

I am a graduate of the public schools at Clifton, have o other education outside of that.

While growing up I assisted slightly my father and nother in running the hotel, working about the hotel; helped ome. I was not very strong and was not able to do very uch.

I spent the time at the hotel prior to the time I was arried; was married in 1919.

Mr. Moser was born in Lometa and raised out on the estern branch of the Santa Fe. He had just had a public hool education; had gone through the public schools at alera.

My age is just past twenty seven.

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fol. 238a] James Harrison, for defendant, by agreement as put on the stand out of order and testified as follows:

Resided in Fort Worth; was formerly vice president of tate National Bank which was afterwards consolidated ith Fort Worth National.

For the last fifteen years has been in the loan brokerage siness and real estate; in that time had loaned approximately two million dollars original and renewed loans; eight [fol. 239] per cent had been the prevailing rate. I do not remember but one loan less than that; some few were placed at more than that, ten per cent, a very few. These loans were placed on real estate at about fifty per cent of the fair conservative price of the real estate. As to whether these loans were safely placed, I have only had one foreclosure in the notes I have handled, and that was $2,500 and the owner of the note was offered $3,000 after the foreclosure proceedings; there has been no loss whatever; none whatever.

The borrower has invariably paid the expense of the loan, examination of title, recording fees of all papers, and all expenses whatever, and the eight per cent was net to the lender. I have been placing loans under those conditions for fifteen years. I can place all I can get now at those figures, within a reasonable time; a man of course could not go out and place it on the spur of the moment. That is my business; I am doing that right along in Fort Worth.

Cross examination:

I am of the partnership of Gilvin & Harrison and have been for the last six years.

I loan for customers and clients; among them is the endowment fund of the Texas Christian University.

I think I have been fairly successful and skillful in the money loaning business over my fifteen years' experience.

It requires experience and skill to safely handle money in reasonable amounts.

Q. You know that it is true that in large volumes in Texas and other parts of the country on gilt edged securities, money returns 3½ or 4½?

A. There is not as much loaned—there is more loaned at higher rates.

Q. I am asking you if that is true?

A. Some large investments have been made in government bonds of course.

Q. Don't you know that in this country now that on any large loan of real estate that you can get all the money you want at six per cent?

A. I don't know about that. On choice business property money is had at six per cent.

I don't understand that the state and county tax rate is the same in all counties. I really don't know what the state tax rate is.

Redirect examination:

I have stated that it does take some experience to handle loans of the kind I have talked about safely.

Of course a person would have to have an idea of the value of real estate on which they make loans and the purpose is to loan about fifty per cent of the market value of real estate, and there is very seldom any losses. In placing this money for people who give me money to invest I give them the benefit of my judgment and experience in placing these loans and in protecting them and placing them; that [fols. 240-244a] is what I sell them; but it is paid for by the borrower; I give them the benefit of my experience in protecting them and that is without cost to them, and they get eight per cent net for their money.

There are other brokers in Fort Worth that do the same thing; I think the prevailing brokerage rate is two per cent which is paid by the seller.

Recross examination:

That is two per cent of the loan paid by the borrower.

Offer in Evidence

Plaintiff here offered in evidence letters of administration issued to Mrs. Moser in the probate court of Bell County, showing her appointment as administratrix of the estate of John H. Moser.

Agreement of Facts

It was at this point in open court agreed by and between the parties to this case that at the time of his death Mr. John H. Moser was in the employ of Gulf Colorado & Sante Fe Railway Company as a brakeman on a train en route from Temple to Bellville, which train carried interstate freight and interstate commerce, and that the defendant was at that time engaged in interstate commerce as a carrier, and that the deceased Moser at the time he received his injuries resulting in his death was in the performance of his duties relating to interstate commerce.

OFFER IN EVIDENCE

Defendant at this point tendered to counsel for plaintiff a tabulated statement covering the earnings of Mr. J. H. Moser from the time he entered defendant's service as a brakeman, and up to the time of his death, representing and agreeing that the same was full and correct; and plaintiff then and there introduced such statement in evidence, and the same is here now offered in evidence by plaintiff. Mr. Moser's gross earnings are shown in the column headed "Total," being the sum of the items shown in column headed "Deduct" and "Net amount pay check" the deductions having been made from the pay checks because of deductions for hospital and for other accounts paid out by defendant on the order of Mr. Moser.

[fol. 245] C. C. [illegible] for plaintiff testified:

That he had a roster of conductors on the southern division of the Santa Fe Railroad.

At the time of Mr. Moster's death on the 23rd of April, 1923, I count twenty six men ahead of Mr. Moser for promotion; he was the twenty seventh man out for promotion. According to my experience as to about how many men are promoted annually, there have been period of lapses of nine or ten or eleven years before any promotions have taken place. There were no promotions in 1922. In 1921 there were ten promotions. In 1920 five promotions. In 1919 there were none; no promotions in 1919.

Off hand I could not tell you how many brakemen there were on that roster.

On a rough count I find eighty eight conductors are carried on this roster of conductors; I may have missed one or two but it shows to be eighty eight (this includes freight and passenger conductors.

The first man in order for promotion is entitled to promotion where there is a vacancy in the position of conductor, that is the first brakeman, provided he can stand the examination. A man's length of service would give him experience for conductor.

I knew Mr. John H. Moser personally.

As far as I know he was a fairly regular worker, as far as I know competent as a brakeman.

I am not entirely familiar with the different rates of pay between the brakeman's position and the conductor's position but fairly familiar with some of them. I will give the difference to this extent: We have what we call rates on locals, on through freight, and then we have the work trains, mixed and passenger service. Now the rates that apply to these I cannot give them off-hand.

If Mr. Moser had been a conductor today working the same time as he did as brakeman on the train I would say his wages would probably be $400 to $500 more per year than as brakeman. I don't know the difference in mileage exactly that they get paid.

Cross-examination:

At the time of Mr. Moser's death there were twenty-seven men ahead of him for promotion; he was the twenty-seventh man up for promotion.

It is true that promotion does not take place by any regular rule; no regularity whatever. The conditions upon which it depends vary right along. It is also true that the railroads are constantly using larger engines and larger trains that result in the movement of fewer trains, and this results in decrease of men needed. Then as larger equipment and larger power are used for economical use of railroads the chance of promotion for a particular man becomes less and less and becomes more remote.

At the time of Mr. Moser's death we had more men [fol. 246] promoted at that time than we needed.

Since April, 1923, we have made three promotions.

I have been connected with the trainmaster's office of the Santa Fe Railroad about fifteen or sixteen years and I am pretty familiar with that situation.

Mr. Moser stands on the roster as entering the service as brakeman on December 7, 1915; and at the time of his death that would be about six years or a little better. Taking into consideration the time he had been in the service the earliest probable time that Mr. Moser would have been in line for promotion considering the conditions, in my judgment it would probably have been six or seven years or better before he would have been eligible for promotion, and then he would have had to stand an examination; he would have to. And this being promoted does not mean necessarily that he is going to commence running a train as conductor; for a good long time after he was promoted he would very seldom run a train as conductor; he would run one occasionally. He would be on the extra board and would still retain his rights as brakeman and the bulk of his work would be performed as brakeman. In the promotion of a man from brakeman to conductor the estimate is made as to how many men will probably be needed for the service. We sometimes overstep ourselves reaching out and getting more men than we need. When a man passes this examination he is placed on the roster as emergency conductor to be used in emergency as conductor when needed. This man will be called upon if he is the oldest man available at the terminal to avail himself to run the train over the road. This would probably occur once in a great while in his early service as conductor, probably more often as conductor as time goes on. This man as brakeman would still perform brakeman's service and his promotion to conductor would not interfere whatever in the performance in his capacity as brakeman. The bulk of his work in the early years of his service after promotion, as stated before, would be as brakeman. We keep a list of men who have had the requisite experience and take them up and examine them and they are placed on the conductor roster.

The business of the railroad varies; sometimes in the summertime and parts of the year we have very little freight moving, and during the fall in the heavy cotton movement or wheat movement we will have a large amount of freight movement. Then we have extra tonnage and we will need emergency brakemen, and they are put in charge of trains according to seniority, emergency conductors. Same rule applies to brakeman. As matter of fact when a man is working for the railroad as brakeman in the early years of his service he has a whole lot of idle time; plenty of it. That gets less as he goes along.

Judging from past experience, in my judgment Mr. Moser would not likely have had a regular run as conductor for fifteen to seventeen years from the time he was set up as conductor and placed on the roster; that would be fifteen to seventeen years.

It is my estimate that after six or seven years, it is my estimate that it would be in the neighborhood of twenty-three years from the time of his death before he would have a regular run as conductor. The best runs are the passenger runs.

The probability of Mr. Moser ever getting to be a passenger conductor would be very vague, small chance, for the reason that promotion, as before stated, is slow, due to the increase in power or, larger engines, the more cars we haul, and the more cars we haul per engine the less trains we run, and the less trains we run the less men we use; and the probability of a man reaching promotion now as they did years back is very remote. It would be at least twenty-three [fol. 247] years before Mr. Moser would receive a regular run as conductor, and that would be through freight or chain gang service, that is the class of service the new men have to take in view of the fact that the older men take the best runs like locals. Taking those figures Mr. Moser would have been a very old man if he ever reached a job as passenger conductor.

As to how long it has been since a man was advanced to passenger conductor on the Santa Fe Southern Division, where Mr. Moser worked, Conductor Lingo, promoted to be conductor December 15, 1898, was the last man promoted to be passenger conductor. Of course that does not give you the time he actually entered the service and I could not give you that date.

Mr. Lingo probably at one time held a job as extra passenger conductor, and he might have held a regular job as passenger conductor during a time when a man was laying off and until he was re-instated. Mr. Lingo has been holding a job as regular passenger conductor about four years. He was promoted in 1898 to be conductor.

If I count correctly there are 101 men on the roster between the man next to be in line for regular passenger work and Mr. Moser.

In my judgment there was not any reasonable probability of Mr. Moser ever reaching a passenger run.

As stated, at the end of six or seven years he might have been up for promotion as conductor and being promoted would give him the opportunity of running as conductor whenever he got picked up on the extra list; and the first year he might make a trip or two, and the next year some more trips, and as time went on gradually increase, and the balance of his time he would have his rights as brakeman and run as brakeman and get pay as brakeman. In my judgment ten years after Mr. Moser would have been promoted to be conductor, that is ten years after six or seven years from now after he had been a conductor for ten years, and predicated on the present scale of wages, the ones prevailing now, taking into consideration the previous performance of other men for that length of time, I will state that the reasonable earnings of a man at that time would be between $2,100.00 and $2,200.00 per year. I am sure that it would be ten years after he had reached that period of earning capacity before he would get a regular run. It would be anywhere up to fifteen years or may be better before he would get the regular run; that is an estimate.

The maximum that he would reasonably expect to reach before he got a regular run, if he was operating as brakeman and conductor I will state about $2,200 to $2,250 before the fifteenth year.

As to what he would get if he had a regular run in the chain gang service as conductor, that would vary with the amount he laid off, if he was a steady worker it would run from $2,500 to $2,700 taking the entire year into consideration.

If everything were all right with him then, for some twenty five or thirty years, twenty or twenty five years from the time of his death, he might get up to $2,500 or probably a little better; that is based on my knowledge of what other men have done. It is true that there is a very great fluctuation in the amount that the men make. Business fluctuations, some men hold up better and keep better health, and some men are more steady workers than others.

Some have more sickness and fall down. What I have stated is the maximum reasonably probable with a man [fol. 248] that works fairly steady; those figures I have stated in my estimation are approximately correct.

The year 1920, as to the character of business that was done by the road in that year, we have a large business, a portion of that time was the largest business we had done; and the rates of pay in force at that time were the largest rates of pay ever in force on the railroads in the United States to my knowledge; that was during 1920 and 1921, and were the rates of pay established by the railroad administration, and those rates prevailed when the roads were turned back to the owners and until the labor board reduced them in July, 1921. I could not tell the exact figures of the reduction at that time.

From May, 1920, to June, 1921, was the highest rate of pay ever paid in this country.

The men out on the road pay their own expenses; the more they run of course the more their expenses. They have hospital charges to pay, deducted from their salary, small amount—$1.00 or $1.25 a month, whatever it is.

Redirect examination:

There have been three promotions of brakemen since April, 1923, the last one July 18, 1923, W. T. Field. He was hired in 1913, July 7, promoted July 18, 1923, lacking a few days of being ten years; so the last man promoted from brakeman to the position of conductor it took approximately ten years from the time he entered service to become a conductor.

Mr. Moser entered the service as brakeman December 7, 1915, so if he were promoted within the same time the last man was promoted, if all the conditions prevailed, he would be promoted two years from now to the position of conductor. Taking the last man up, taking the actual test on that, the last man promoted, if Mr. Moser would receive his promotion in the same length of time it would be two years from now, if you use the same figures. Then he would act as extra conductor only at such time as no other preferred man was at the terminal.

A man is not a regular conductor until he gets a regular run. The last man holding at the present time a regular job as conductor, that is the last man promoted, was Conductor Boren. He was the last man promoted, holding a job as conductor now. There are other men promoted down here not eligible to the regular run simply because there are not enough cars on; there are other men promoted to that position.

Anyway he, Boren, would be the youngest man as conductor, holding a regular run at the present time. He was hired as conductor in 1909, hired him straight out. That was J. Boren. He is a freight conductor.

We had at the time about twelve or thirteen men on the regular passenger service in the Southern division. We had eight men in the local service; three men in mixed service; eight men in preferred service running through freight jobs, and seventeen men in chain gang service; those men are regular; that is approximately correct.

We are at the present time carrying three extra conductors. They do the extra freight work. Those men stay in terminal and protect the board whenever a regular man lays off either on local or through freight.

[fol. 249] That is what we call the extra board; that is set apart. There is nothing irregular about running but it is regular in so far as position is concerned.

There were forty nine men in what I call regular positions.

As I count it there are forty three other conductors in service that act as brakemen also. Some of these do very little braking service and some who have just been promoted do very little service as conductors; some that have been here fifteen years holding jobs as conductor, doing about fifty fifty in the service as conductor and brakeman.

A man who is promoted to the position of conductor for the first year makes very little more than a regular brakeman; gradually increases as the years go by.

Recross-examination:

The forty three extra conductors that I counted are not in regular runs at all. There are approximately that. Now the last man who has been promoted is Mr. Fields.

There were twenty three men between Mr. Fields, who would go up for promotion on that brakeman's list, ahead of Mr. Moser, after Fields, at that time; that did not include Mr. Moser. Adding the twenty-three brakeman to the forty three extra conductors there would be sixty-six conductors and brakemen ahead of Mr. Moser without any regular run that would have to be provided for and gotten out of the way before Mr. Moser would have had a chance for a regular run; that is what the record indicates.

Fields was promoted on the 18th day of July, 1923; then there was a man promoted June 7, 1923, and one promoted June 10, 1923. The roster shows that the three last men have been promoted are the only men who have been promoted for conductors since August 4, 1921. Three men in a fraction less than two years, and there are twenty three men still ahead of Mr. Moser before he could be promoted.

Redirect examination:

I did state there were ten men promoted in 1921 and five in 1920, making eighteen promoted in the last three years.

Recross examination:

Conductor Boren was employed as conductor.

We have the privilege of hiring men for every third man promoted, so we can hire men from the outside if desired.

Promotions in the railroad service is not as rapid now as it was in 1909 and 1913. There is quite a difference in promotions since then.

[fol. 250] J. F. Francis, for plaintiff, testified:

That he is a conductor in the employ of the Santa Fe Railroad, and was conductor on the train at the time Mr. Moser met his death on the 23rd of April, 1923. There were two brakmen on the train, the other was named Baldridge. Baldridge was head brakeman, and as such was stationed at the head end, and the hind brakeman, Mr. Moser, was on the hind end.

I did not know anything about Mr. Moser's death at the time it happened. The last time I saw him, I took it to be him about fifteen or sixteen cars from the rear end of the train coming up Lyon's Hill going south; he was walking, coming toward the engine from the rear end of the train, working toward the front; I took it to be him. I would say that was about a mile from the station; about a mile before we got to Lyons, and Mr. Moser's death happened, as I understand, three or four hundred yards after we passed the station at Lyons, so we had probably travelled from the time I last saw Moser until he was killed a little over a mile, probably a mile and a quarter or mile and a half.

When we whistled for Lyons I looked at my watch and we were a little ahead of time, and I got down on the engine and told the engineer we were a litle ahead of time, and he said we would kill a little time and be up by the time we got to the switch. We did not stop at the station. We were running very slow, killing time. We were due there about 4:55 and it was 4:53 above the station when I spoke to the engineer and the engineer told me by the time we passed the south switch the time would be up.

It was three or four minutes from the last time I saw Moser until he fell from the train I suppose, I don't know when he fell.

The last time I saw him he was probably fifteen or sixteen cars from the caboose. I don't know what time he fell off. Judging from where they found him it must have been pretty close to five o'clock, probably 4:59; along in there. We were running very slow. I never saw him after his death.

As far as I know, no one on the train knew of the accident until after we got to Somerville, some three or four miles beyond the place of the accident; when we got there he was missing; another train crew went back and got his body I think. I saw the car with the poles in it and the hole in the floor through which he fell. I did not inspect that car before the accident. I am not a car inspector. If I was passing by and seen anything out of the way I would have inspected it. We stop for inspection at different places. The brakemen inspect the train; at different places we have regular car inspectors, and we inspect trains too at different places, stop for inspection.

I have been a conductor over twenty years; had been a conductor on other roads before my service with the Santa Fe, and I broke for a while before I first came to the Santa Fe; was a brakeman about a year and a half.

I think brakemen get $2.45 per hundred, and conductors get 5.80 a hundred miles in chain gang service; I get 5.80 per hundred.

I don't know what a regular conductor who hasn't a regular run gets per mile. I don't know what the pay is. If there were extra men on my run I suppose they would get the same pay that I do.

[fol. 251] Cross-examination:

It is a brakeman's duty to look out for anything out of the ordinary, anything defective, watch out for it. We have inspection stations on my run at Cameron and Caldwell. It is a brakeman's duty to keep an eye out and look out for the train—anything that is dangerous for the train or anybody else.

Mrs. N. A. [illegible], for plaintiff, testified:

That she knew John H. Moss in his lifetime; had known him for ten years; knew him well; knew him to be a good man, devoted father and husband, and a man who loved his family.

W. J. Bassett, for plaintiff, testified:

That he lived at Temple and was in the life insurance business, and had been engaged in that business over twenty-seven years, and was now connected with the Southwestern Life Insurance Company. That he was familiar with life and expectancy tables, had some with him.

Cross-examination for the purpose of an exception:

Insurance companies do make a different rate on men engaged in the service of a railroad brakeman; it is considered a hazardous occupation; most of the companies who accept freight brakemen, take the general expectancy or premium of the standard risk and add to it what is called an occupational extra premium.

It may be that there are shown by my tables companies who add a certain number of years to the age of the man engaged in a dangerous occupation and then take the rate of that age. It is not shown by this table. I have not seen in this volume that I have, it stated that some of the companies add seven years to the age of a brakeman and figure his expectancy as that of a man seven years older than he is; I don't know whether that is correct or not; I am not familiar with it.

Direct examination (cont'd):

The life expectancy of a man twenty-eight years of age under the American Experience table is 36.73 years; according to the Combined Actuaries table 35.86 years. The average of those two tables would make it an excess of 36 years.

This table presumes the expectancy of life of a given number of persons taken at the age of twenty-eight without respect to their physical condition, their sex or their occupations.

I get that information from my service in connection with this character of business during the past quarter of a century.

(fol. 252) Cross-examination for the purpose of an exception:

I did not read that from this book. I got that information from my service in connection with this character of business during the past quarter of a century. No, sir, that table is not made up only from accepted risks from insurance companies. This Experience Table is not made up by the Insurance companies on their accepted risks and from no other source; the American Experience Table is not made up from accepted risks. As to how I know, just the same answer I gave a moment ago: from my experience in this business for twenty-five years. That table was made up before I ever went into business. As to how I know how that table was made up, it was made up from 1,000 lives taken at the beginning at the age of ten without reference to occupation, because at the age of ten they had no occupation. Yes, sir, someone has told me that, that is the basis of the American Table. That is correct, someone told me that.

Redirect examination:

The American Experience Table is the average length of time that all will live at the age of twenty eight.

Annuity means in the life insurance sense the amount of money to be paid annually to a person during their lifetime; that is what is known in life insurance as an annuity. Life insurance companies sell annuities based on certain rates of interest.

The cost of an annuity of $1,800 a year for a person twenty-eight years of age at four per cent, the present value of an annuity of one dollar, the first payment to be made at once, according to the combined experience of American Experience Tables of Mortality at the age of twenty eight years would be $18.36, at four per cent, and to arrive at the value of an annuity of $1,800 multiply $18.36 by $1,800, and if you were to buy an annuity of $2,400 a year you would multiply 18.36 by 2,400. Based on $2,000 a year the present cost of an annuity would be $36,720, and on $3,000 a year would be $55,080.

That four per cent would be the rate of interest without reference to any other charge, expense, taxation, or any other charge; straight mathematical calculation.

C. E. [illegible], for plaintiff, testified:

That he lived in Belton and represented the Southwestern Life Insurance Company, and also Loan Association, and had been in the insurance business about twenty years. Had heard the testimony of Mr. Bassett as to the authority from which he was testifying.

The American Table of Mortality is used by all insurance companies as far as I know. We have probably the books of fifteen or twenty insurance companies, different companies, and they all use the same tables.

The life expectancy of a man twenty eight years of age is 36.73.

[fol. 283] I am not familiar with annuities.

By expectancy is meant that the average man will have that many more years to live added on to the twenty eight.

Cross-examination:

What I am testifying from is called the American Experience Table of Mortality.

All the information we have about this matter is gotten out of books. I did not start it. My information in regard to whether this covers all people of twenty eight years or only accepted risks, is just what is in the book.

E. E. Bateman, for plaintiff, testified:

That he was brakeman on the train at the time Mr Moser met his death.

The rate of pay received by a brakeman in the service in which he and Mr Moser were engaged was 4.48 for one hundred miles. That he had been extra conductor since the first day of April, 1912, part of his service was that of brakeman and part that of conductor.

As to the proportion of time in the last two years he had served as brakeman and the portion as conductor, there has been little as conductor in that period, would not average a trip a month; most of his work had been as brakeman.

The last time I saw Mr Moser I think was just about even with the station at Lyons; at that time he was sitting on top of the car, on a refrigerator car just behind the car with the oil well pipe in it; I would judge it was that car; so if he fell through the floor of the car loaded with oil well pipe he had gotten up from where I last saw him and moved forward to the next car.

We were going to set out some cars at Somerville, Bellville was the end of our run.

The cars to be set out at Somerville where I believe all cars ahead of this car of pipe. Somerville was not the destination of this car of pipe. According to my recollection it went on through to Galveston. The cut out of cars to be made at Somerville was just ahead of that car of pipe.

I dont know why the car was left there at Somerville on that occasion unless it was bad order; probably cut out on account of bad order after the accident.

I saw the car after the accident; saw the floor in it.

(The piece of metal that was testified to by Mrs. Moser was shown to the witness.)

I could not tell about this piece of metal. This resembles a part of the floor. It is similar to the floor of the floor of [fols. 254 & 255] the car where the hole was. It is similar in appearance and character to the floor which the man went through; that is some parts of it.

I don't know what kind of metal it is composed of; I don't know whether it was iron or steel, steel I would think; I don't know what kind of composition it is. I did not go back to the scene of the accident; went on to Bellville that evening; never saw Mr. Moser any more.

I did not miss him until our arrival at Somerville; don't remember which of our crew missed him first unless it was me.

I possibly had known him eight or ten years, and what work I have had with him he was a very competent brakeman. I would hardly know whether he was a man that stayed on duty and worked regularly or laid off; as far as I know he worked regularly; I never knew him to lay off. As far as I know he was a man of good habits; I never knew anything else.

I did not know his whole life of course, I don't know what attention he paid to his child and his home; only when I would see him out with his child somewhere, meet him sometimes; I would see him taking care of the child, attentive to her.

Cross examination:

I was promoted to conductor in 1903, that is ten years ago; I do very little running as conductor; work almost entirely as brakeman still.

I do not undertake to say that the piece handed me is a piece of the floor of that car.

Redirect examination:

I have stated that the piece of iron handed me was similar in appearance to some portions of the floor of the car near the hole, that is the metal looks of the same character.

Recross examination:

The metal looks the same.

Q. What portion do you mean? You say "some portion." Explain what you mean to the jury so that they will have all the facts.

A. Cars of that type, the steel floor.

I say that it looks like the type of steel floor generally, that is of the old cars. Some portions of them look that way, while others might be a little heavier than that, but that shows it was worn from rust. That is the type of floor of cars of that particular type of car. That Pennsylvania car, that kind of metal is common to them.

[fol. 256] Mrs. [illegible] MOSER, recalled in her own behalf, testified:

In response to question by Mr. Lee I said my father was living; 78 years old.

Mr. Moser did not contribute anything of his earnings to any other person than myself and my child. He spent his earnings upon his family.

Cross examination:

Mr. Moser did not send his father money from time to time; not in our married life, we needed it ourselves. He was not able to do anything for his father, in fact his father had helped us when we were first married.

His father is 64, lives at Valera, has a very small farm; his mother is living out there too.

We were married since 1919, and he gave nothing to his father during that time.

Plaintiff rested.

[fol. 257] Ed. [illegible], for defendant, testified:

That he is in the employ of the Santa Fe Railway Company as conductor and lives in Temple and has lived there for over forty years, and for about twenty years has been putting out money at interest. That he had gotten for his money from eight to ten per cent, and had loaned it out at those rates.

That he got real estate as security, safe security. The party borrowing the money paid the expenses.

That he had been doing this for twenty years; that he was doing it at the time of the trial; had no difficulty in putting it out at any time he wanted to. He put it out for others and helped them to put it out.

Cross examination:

I render my notes for taxes and pay the taxes.

I don't know what the city tax rate is. I think it is about $2.00. I don't know the state and County tax rate. I think it is approximately $1.50, about that.

BERT STANTON, for defendant, testified:

That he lives in Temple, Texas, working for Cameron Lumber Yard there as manager.

Cameron & Company in connection with their business have for sale and sell vendor's lien notes on new residences and city property, and have been doing that there in Temple ever since he has been there—since 1919; for the last four years. Has been with the firm at other places and the same practice has prevailed.

Up until the time the war came on we kept all that paper ourselves, because we considered it a good investment, but after the war it took so much more money to run our business, that we decided to discontinue that practice and what paper we have had since that time we have had it for sale.

The rate of interest was eight per cent, that is what people who took it over from us got. The party who gets the money pays the expenses incident to the examination of title, passing on the loan, brokerage fees, etc. The eight per cent is net to the lender. The security is mechanics or materialman's first lien on the house or property at approximately fifty per cent valuation of the property. The security of those loans is the very best of security.

[fol. 258] E. T. KENNAN, by deposition, for defendant, testified:

That he is a resident of Philadelphia, and is superintendent of Car Service for the Pennsylvania Railroad System, and that part of his duties in January, February and March, 1923, were to keep a record of all cars moving over the Pennsylvania Railroad System and the record of all such cars while away from that line; that he did not personally keep these records, nor were they kept under his personal supervision, but under the personal supervision of an assistant Chief clerk; that they were accurately kept from day to day from original reports from conductors in charge of trains and from agents in charge of interchange points.

That his records show that Pennsylvania car 288751 was at Elmira, N. Y. empty on January 1st, 1923, at which point it stood until January 22nd, when it was placed in shops at the above mentioned point empty and was turned out of shops the same day. That the car left Elmira empty on January 23rd and was placed at the New Alexandria Colliery #5 January 27th, from which point it was loaded on January 29th to Ogdensburg, N. Y., and that it was delivered to the New York Central at Himrods Junction February 7th and by the New York Central to the Rutland Railroad February 12th. That his records do not show the date the car arrived at destination, nor the date it was released from the load, which information is disclosed only by the records of the Rutland Railroad. That the car was returned empty from the Rutland Railroad to the New York Central Railroad February 20th and by the New York Central to the Pennsylvania Railroad at Wallington, N. Y., February 28th, from which point it was moved empty and placed at Leller Mine near Brownsville, Pa., March 11th, from which mine it was loaded on March 12th to the Youngstown Sheet & Tube Company, Youngstown, Ohio, with 88,800 pounds of coal, at which point it arrived March 14th. That the car was loaded from Youngstown, Ohio, March 21st to Apollo, Pa., at which point the car was made empty and left Apollo March 27th for Pittsburgh, South Side, at which point it was delivered to the Monongahela Connecting Railroad March 28th. That on March 31st car was delivered by the

Monongahela Connecting Railroad to the Pittsburgh & Lake Erie Railroad, on April 1st by the Pittsburgh and Lake Erie to the Pittsburgh, Chartiers & Youghiogheny, on April 7th by the Pittsburgh, Chartiers & Youghiogheny Railroad to the Pittsburgh & Lake Erie Railroad, on April 12th by the Pittsburgh & Lake Erie Railroad to the New York Central Railroad, on April 17th by the New York Central Railroad to the Indiana Harbor Belt Railroad, on April 18th by the Indiana Harbor Belt Railroad to the Atchison, Topeka & Santa Fe Railway, and on April 22nd by the Atchison, Topeka & Santa Fe Railway to the Gulf, Colorado & Santa Fe. * * * That to the best of his knowledge all the commodities transported in this car were loaded on the floor of said car and that there is nothing in his records to indicate that the car failed to sustain the commodities with which it was loaded.

Cross-examination:

That he made no personal inspection of any cars on the Pennsylvania Railroad System. That he personally did not keep said records, but that said records were kept under the direct supervision of an Assistant Chief Clerk and as these records were made currently from original reports, he has every reason to believe that such records were correctly kept and that the records furnished showing the movement of this car are correct in every detail. That he does not have any personal recollection or knowledge as to Pennsylvania car 288751 during the months of January, February and March, 1923, except such information as is disclosed by records kept under his supervision. That he did not see said car. That he did not personally inspect said car. That [fols. 259 & 260] he has no personal knowledge as to its movements, as to the commodity with which it was loaded and that he can testify only as to the records kept by him, which records reflect the information furnished by others.

[fol. 261] M. W. G. HUFFMAN, by deposition, for defendant, testified:

That he was foreman of the Neville Island Pipe Yards of the Frick and Lindsay Company in 1923; that the company shipped in April, 1923 on an average of about one carload of pipe a day; that he would oversee the loading of the pipe on the cars so far as necessary; would pay particular attention to the quantity put on the car.

If I have old hands working for me they do the loading and I do not have to bother much with it outside of seeing that the proper quantity is placed on the car. If, however, there are new hands loading I tell them how much goes on and how to put it in the cars. Of course there is never a whole new crew. So long as there are one or two old ones there I would not bother. If I have old ones I put them on the car and they know how it is done.

I always have four men and one crane man, and of course the crane men do not belong to my crew only when loading pipe. The pipe is placed on the car by crane.

In loading a car there are two men, one at each end of the pipe in the car. They place the pipe in such manner so they will not be coupled and they take the hooks out of the pipe. Two men are placed on the car with the pipe and the crane men operate the crane in moving the pipe from the pile to the car. If any stakes are necessary any of the men place the stakes in position.

I keep a record of the pipe loaded by the company; from these records it appears that Pennsylvania Railroad car 288751 was loaded with 10-inch pipe, I think, at Frick and Linsday Yards at Neville Island on April 7, 1923; the length of the pipe I don't remember but the pipe are usually estimated at an average length of twenty feet. The shipment was loaded for Texas.

The car was received from Pittsburgh, Chartiers and Youghiogheny Railroad. I do not inspect cars as they are supposed to be in good condition for loading when they come in; and I do not make a practice of looking at the cars set for loading of pipe, and I am not in position to state the condition of Pennsylvania Railroad Car No. 288751 at the time it was loaded at Frick and Lindsay Yards, but in all probability if there were holes large enough in the floor through which a man might fall, my attention would in all probability have been called to it, but I have no recollection of my attention being called to any such holes.

Within the past six or eight weeks three pictures were shown me which were supposed to be the picture of the Pennsylvania Railroad Car No. 288751, with a load of pipe on it. I looked at the pictures and the pictures did show a hole in one end of said car. There were no such holes in said Pennsylvania Railroad Car No. 288751 at the time of the loading at Frick and Lindsay Yards on April 7th, 1923, as shown in said pictures, otherwise my attention would probably have been called to same.

In loading cars with pipe there would be two men, one on each end, and probably there would be two, maybe three or four, men in putting up braces to keep the pipes from rolling off the car when they get up above the siding. These pipes were put in the middle of the car, according to the [fol. 262] picture, and the men would be at either end of the car seeing that the pipe was properly piled up. The men would also walk from side to side at the ends of the car as the pipe was being loaded.

Cross examination:

I cannot state definitely how many cars of pipe were loaded by Frick and Lindsay Company at their Neville Island Pipe Yards, because in the moving of the Yards from the Fravo Contracting Company property to the new location of the Frick and Lindsay Pipe Yards, the records became mixed up.

I have no personal recollection or knowledge as to the loading of each car of pipe. I do not remember particularly the loading of Pennsylvania Railroad Car 288751 during the month of April, 1923, but from the records kept know that said car was loaded.

I have no personal recollection of having made any particular inspection of Pennsylvania Railroad Car No. 288751.

I have no personal recollection at this time as to any particular inspection that was made of said car No. 288751. I only know that men in loading the car would walk over the floor at either end thereof. I am testifying from records and recollection and the practice of the men in loading said cars.

It was not my duty to inspect or examine the cars. I am not a car inspector. I am not familiar with the duties of a car inspector.

It is true that I do not make any personal examination of the cars but assume them to be in serviceable condition when turned over by the Railroad Company, and it is true that I have no personal knowledge and no personal recollection as to the condition of Pennsylvania Railroad Car No. 288751.

I do not undertake to state positively at this time I have personal knowledge and recollection of the condition of the floor of the car.

I did not make an inspection of the car or the floor thereof.

[fol. 263] ——— Barrett, for defendant, testified:

That he is a freight conductor in the service of the G. C. & S. F. Railway Company, and has been since 1905. That about the 22nd of April, 1923, he handled Penn. car 288 751, and from his train book (which he held before him) he could testify that he handled said car from Shawnee, Oklahoma, to Gainesville, Texas. The G. C. & S. F. Ry. connects with the A., T. & S. F. Railway at Gulf Junction. That he had no personal recollection of the car in question whatever. That his attention was first called to the car about the 20th or 22nd of November, after this accident happened, and that he had no recollection at that time about the car personally at all.

That it is customary for conductors and brakemen to pass backward and forward on the train when it is in motion, but does not remember whether he had passed over that train on that trip or not; that if he did he has no recollection of it. That if he had passed over that train and there had been any holes in that car that were dangerous for train men walking over them he could probably have noticed them walking backward and forward, and if he had noticed them he would have made a note of it and made a report of it. That it is part of the duty of a brakeman to look out for anything of that kind.

Cross-examination:

I have seen a picture of the floor of the car, the picture offered in evidence; it shows apparently the worn, rusted and eroded condition of the floor. With most of these Pennsylvania cars there is a solid steel runner right through the center of the car and quite a few of them have trap doors for the purpose of unloading coal through the center of the car and the floor rests upon this center piece here and also upon the sides—there is a heavy piece of steel there. I see one of these cross pieces in the picture—two of them.

I would estimate that it is something like three and a half or four feet from the center of the car to the sides. From one of the crosspieces, from one side of the car to the other, to another cross piece, would be about the same distance; the blocks or spaces made by the cross pieces and center piece may be two or two and a half feet across; I would not be positive; the picture would indicate it was something like two and a half feet.

In other words, this sheet floor would rest upon strong steel pieces and it would be in squares or blocks something like three and a half feet one way and two and a half feet the other. Looking at this picture it appears that the front part of this hole turned down or broken off almost straight across even with the frame it rests upon, and looking to the rear it seems to have broken some six or eight inches to the front; it is broken; I can't testify by looking at this picture at this time whether that is an old break there or not, or whether it is merely a new break as it went down from the front.

I never saw the car.

Looking to the extreme left hand side of the car as the car is facing you in the picture you can also see the holes rusted and worn through there. Looking to the center as it rested upon its support there and just along from the iron support it is resting upon, there you see also it is worn [fol 264] through there; and just opposite that on the other side you see where the same is rusted through the entire lengths as shown in the picture; and also you can see the same over to the right side of the car, and you can see a place rusted through across the face of the sheet on the other side and in next to that support.

If I had seen that flooring to have been in that condition before this large hole was pressed in there I would have reported the car. As to whether it was not a safe car to be on the road in that condition, lots of times a car will get in that condition and you have got to unload it and bill it home for repairs; you can expect all those trap doors to be in bad shape on those cars; no doubt if the company knew the car was in that shape they would have made different arrangements with it.

Redirect examination.

(Witness points out in the picture under the edge of the car the outline of the trap door or about where it would be located.)

I don't say this car has any trap door, you understand; this is where the trap door seems to be (indicates).

As indicated by the picture the trap door is under the pipe and comes up to about this point (a little beyond the pipe).

That black spot in the direction of and toward the end of the pipe looks like it is the depression for the trap door, and the pipe extends practically over the trap door, just enough that you can look back under the pipe and see where it may be.

(At this point counsel for defendant stated that there is no contention in this case that the trap door was anywhere where anybody could fall into it.)

The trap door is not very clear in one of these pictures but you can see it clearly in the other. I see the piece of the floor hanging down under the car and the white scratch across it.

"(Witness then at this point locates before the jury about the edge of the trap door.)

I have seen this picture of the car with the hole in it, and I have seen the picture taken of the car from the outside with the flap down under the side of the car. If I had passed by and seen that flap hanging under the car I would have made a record of it, if I had seen that big hole; that would not have escaped my attention.

Recross examination.

This trap door is in a "V" shape and is opened by a chain, and when it is opened it leaves the bottom of the car open; it is only supposed to be open when they are unloading coal or coke, and at all other times it is closed.

(Statement by counsel for defendant: There is no controversy in this case that the trap door had anything to do with the accident. There is a shadow in the picture and we were just explaining about that shadow. It is not claimed that the trap door had anything to do with the accident.)

[fol. 265] About fifty miles of the run from Shawnee to Gainesville is on the A. T. & S. F., until we get down to Gulf

Junction, and eighty-three miles is on the G., C. & S. F. That is my regular run. *The* is my regular run. The Santa Fe has a car inspector at Gainesville supposed to inspect all cars coming through, and the A., T. & S. F. has them at Shawnee; and then there is a car inspector at Cleburne and one at Temple.

So this car had evidently passed all those inspectors coming out of Temple, and these men are specially employed to inspect all cars and their equipment coming through; that is their special duty.

At this time it was admitted that Mr. Moser's train crew only took charge of that train and this car at Temple, and it was coming on to Bellville, and Moser had no connection with it until it was ready to leave Temple.

J. R. Rison, for defendant, testified:

That he is a brakeman working for the G., C. & S. F. Railway Company. That he had check up the records and found he was with the witness Conductor Barrett on the run from Shawnee to Gainesville April 22, 1923. Did not keep any record himself of the run; could not recall what cars were in the train; had no recollection of Pennsylvania car 288751. On the run he would have occasion to go backward and forward on the train.

My attention was not called to our having handled this car April 22, 1923, until some time in October, and then I had no personal recollection about the matter.

If I had gone back over the train and found a car the floor of which I thought was in an unsafe condition it was my duty to report it. The other brakeman was R. E. Hammonds; he is dead.

Cross-examination:

When our train crew goes down to the yards at a terminal and find an engine and train lined up ready to go, which has been inspected by the regular inspectors appointed by the company, we assume that that train is safe to go out on and we do not undertake to make an inspection of it, nothing only the handbrakes, and we expect that train to be safe for us to ride on, and expect it to have been inspected by our car inspector.

(At this point it was stated by defendant that there was no controversy made that the trainmen had the primary right to assume that the train was in a safe condition.)

[fol. 290] STANLEY DEAN, for defendant, testified:

That he is freight conductor on the Santa Fe, and from his train book (which he had before him) he knew that he had handled Pennsylvania Car 288751 on April 22, 1923; that after that date his attention had been called to the fact he had handled the car some ten days or two weeks before he testified, and that he did not have any independent recollection about that car at all at the time of the trial, and could not tell the jury anything about its condition. That his records showed that he handled that car from Gainesville to Cleburne. In making that run he might have had occasion to pass over the train while in motion; he did not often pass over the trains but his brakemen occasionally did when necessity demanded it.

If he had passed over that train and noticed any defect in the floor which he regarded as dangerous he would have reported it; there would have been a report made of it. That he had no recollection about this car at this time, and all that he knew was that he had it in his train at that time.

D. H. MAGNESS, for defendant, testified:

That he is a brakeman in the employ of G., C. & S. F. Railway Company, and had looked the matter up from Conductor Dean's train book and knew that he was with Conductor Dean as brakeman on the trip on April 22, 1923. That he had no recollection of this Pennsylvania car at all; that his attention had only recently been called to the fact that he had made that trip; that at this time he had no recollection about the car whatever.

As a brakeman it becomes my duty from time to time to pass backward and forward over the train; do that some times; do not recollect whether I had any occasion to do so on this trip or not.

In passing backward and forward it is my duty to keep my eye out for any defective condition that I might notice about the cars. If I had noticed any defective condition in going backward and forward on this trip that was dangerous to the men on the road it was my duty to have reported it and I would have done so. The other brakeman on that train was Mr. Cann who was recently hurt in an accident.

[fol. 267] Cross examination:

We inspect hot boxes and drawbars after we get out on the road, and if we were to get out on the road and a defect would appear in any of the machinery it would be my duty to look after it, but I assume it is all in good shape in starting; unless I notice some defect I assume it is all right.

Redirect examination:

Everybody in train service on the Santa Fe is supposed to watch out for any trouble on the train.

E. R. Hicks, for defendant, testified:

That he is car inspector for G., C. & S. F. Railway Company, located at Dougherty, Oklahoma, which is south of Gulf Junction. That in April, 1923, he was working at Gainesville as car inspector, and from his books he is able to testify that he assisted in inspecting Penn. car 288751 in April, 1923; at the time it was in Train 37; inspection made just after the train got in; was assisted by Ed. Hunter and A. C. Anderson.

I climbed on top and went over the length of the train and also inspected the sides partly. The other men worked on the ground; I was the man who went on top of the train.

I have seen the picture of this Pennsylvania car offered in evidence before. As to whether that large hole was shown in this picture was in that car at the time I inspected it at Gainesville, I could not be positive but if it had been there I believe I would have seen it and bad ordered the car; I don't believe it was there.

As to the smaller holes shown along there in the picture running along about the middle of the car, some holes, the holes on the left of the picture and some over to the right side of it, they could have been there possibly when I inspected it, those cracks.

I don't bad order those steel bottom cars for those cracks because there are quite a few that have cracks but that bottom is supposed to be steel; that class of cars have got a metal bottom and there are quite a lot of them cracked and it don't mean the bottom will give way because there are cracks there. It is supported underneath, and lots of those cars have cracks running along the side and the bottom ain't cracked at the end at all. I exercise my judgment on the floor as to whether it is safe for a man to pass on it and pass it on that condition. I have no recollection of passing this particular car.

I can state what my practice was and what the regular rules were, but I could not say I looked at the floor of this particular car when it passed through here at that time; I did have a method of inspection and it is my purpose in going over the top to see if the roof was safe, and I inspected the floors as I came to them and I only passed them when they were in my judgment safe.

[fol. 208] Cross-examination.

I have no personal recollection of ever having seen that car, and I am testifying only from the records.

As far as my memory is concerned I have no more recollection of that car than I have of any other car that I may have inspected out of the great number of them that may have passed through for months and months. It was our orders and the duty of the car inspectors to go over these cars and inspect them for safety. I cannot positively say whether this particular car had holes in it when I inspected it or not. But if it had had the hole, according to all my practice in bad ordering cars I would have had ordered it.

If I had inspected the floor of that car and had seen an unsafe condition to have been there I would have bad ordered the car and would have reported it. I can only testify from my record as to whether I did actually see it or not, and my records do not show to what extent I inspected the floor of that particular car.

Redirect examination:

If I had found anything the matter with that car in that inspection my records would have shown it.

I cannot go on personal recollection as to this car; all I can go on is the regular rule, and the regular rule was to go on top of the cars and inspect everything; that was my duty and I performed my duty and I saw nothing about the car that caused me to make a note of it, and if there had been anything out of the way it would have been in this book.

Recross examination:

If I did not make a note of it the boss would jack me up, and he hasn't jacked me up yet. The train was standing still and the car was in it when I inspected it.

A. L. Hughes, for defendant, testified:

That he is conductor in the employ of G., C. & S. F. Railway Company. From inspection of his train book he knew that he had handled Pennsylvania Car 28851 from Cleburne to Temple. That he heard of the accident to Mr. Moser the same day that it happened, and thereafter while the matter was still fresh in his mind he looked in his train book to see if he had had this particular car, and found that he did have this particular car in Temple; that the matter was brought to his mind sufficiently close to the happening of the accident for him to be able to tell the jury whether he had passed over that train from Cleburne to Temple, and to tell them that he did.

I remember passing over this coal car loaded with pipe between Morgan and Meridian. I passed over it by passing around the rail of the car from the north end to the south end, the rim of the car, and holding to the pipe and stakes and walking from the end of the pipe on the rail of the [fol. 265] car, on the rim which was about four inches wide; this was a distance of about six feet that I would have to step here on the top of the side.

As conductor of the train it was part of my duty to watch out and notice anything out of order about the train and any defect in it.

I never noticed anything particularly about that car as I passed over it that attracted my attention as being dangerous or anything of that kind. If there had been anything out of order that came to my attention I would have reported it. I would have noticed if there had been holes in this car like the one shown in the picture here with the flap broken down, hanging down, like is shown in this picture. I don't think that hole was there in this car at the time I passed over it; if it had been there I probably would have noticed it.

Cross examination

I don't particularly remember whether or not I noticed the floor of this car and yet I do remember particularly of passing over the car and my manner of doing so. As to whether I remember whether I looked at the floor or not, I probably did but I don't remember whether I did or not. I am not sure that I noticed the bottom of the car. If there had been a hole in it of the size of the hole shown in the picture I would have noticed it though, I think. When I got on my train as conductor the train had been inspected and made up and brought out, and I got on it without inspecting it, relying on the fact it had been properly inspected and is safe to be out on the road, and still relying on that fact although I passed over that car I did not make any particular inspection of the floor.

A. L. Swarm for defendant, testified:

That he is a brakeman in the employ of Santa Fe Railroad, had just heard Mr. Hughes testify. I was brakeman with him on that trip and heard of the accident to Mr. Moser that evening. I came in with Mr. Hughes on the day Mr. Moser was killed; my attention was called to the accident on my trip from Cleburne down shortly after the accident to Mr. Moser, and being so called I can now tell the jury whether I passed over that train between Cleburne and Temple on that trip April 23, 1923; I believe I remember going over it twice, coming up Morgan Hill and coming up to Manhattan north of Crawford. I don't remember whether it was a Pennsylvania car or not. The car shown in the picture offered in evidence looks like the car we had. It was loaded with pipe in that way. I remember passing over the car loaded with pipe; the car I passed over was about fifteen cars from the caboose; don't remember any other car in the train being loaded with pipe.

As best I remember, I got down on the floor of that car loaded with pipe. I swung down and put my toes in the end of those pipes and went down the pipe, as well as I remember, and then got off on the floor and walked to the end of the car.

It was my duty if I had noticed anything wrong with the train or dangerous to it, to have reported it to the conductor.

[fol. 270] As I passed over that car I don't remember of seeing anything wrong about it, nothing about it that impressed me as making a condition of danger.

Cross-examination.

Q. You did not inspect the floor?

A. I did not see any holes in it, and I did not stop to make any inspection. I don't remember seeing anything wrong with the car; I probably did look at the floor; I don't remember whether I did or not. I remember going over the car and down in it, and the reason I remember is that I was called on for a statement about it afterwards. As to whether there was anything particularly to impress upon my mind in passing over that car, inspecting the floor and seeing if it was all right, I don't remember seeing anything wrong with the car.

I heard about the death of Mr. Moser shortly after it occurred; the fellows told me he fell off a coal car; some fellow told me that. I did not hear about him falling through the floor of a car, not at that particular time. When I learned that he fell through the car for sure was when I made out the statement; that was shortly after it happened. I was told he jumped off a coal car, and when the claim agent had me up there for a statement he told me about it. I did not hear the day of Mr. Moser's death that he had fallen through the floor of the car, and there was nothing until I did hear that to impress on my mind the fact that I had passed over the car that had a defective floor in it through Mr. Moser had fallen.

Redirect examination:

The statement that I gave shows to be dated April 30, and I heard at that time that Mr. Moser had apparently gone through the floor of the car; this was seven days after the accident.

I remember that car of pipe, and remember my going down on the floor crossing over the car of pipe.

C. H. Tuman, for defendant testified:

That he is a car inspector in the employ of the Santa Fe Railroad and remembers the occasion on the 23rd of April, 1923, on which Mr. John Moser met his death between Lyons and Somerville.

I inspected that car in Somerville Yards shortly after the accident, possibly an hour—somewhere about that time, after the accident; they wired in and notified us to make inspection of that car on arrival at Somerville. It was a short time after the accident that inspection was made. We inspected the car as soon as it got to Somerville. In the inspection we discovered a hole in the car.

The car shown in the pictures offered in evidence and now shown to me is the car in question. This picture of the car correctly reflects the condition of the floor and the flap in the floor at that time. The break in the car floor was part old and part new. I saw the metal of which the floor of the car was composed.

(fol. 271) (The piece of metal introduced by plaintiff and given to Mrs. Moser as having been taken out of this floor as testified by her, was here shown to the witness.)

I don't think the piece of metal now shown me came out of that floor. It is too thin. It is iron and the deck of that car was steel.

I made a test in examining that car to see the strength of the steel. I got hold of this piece below the deck of the car, the flap, that had gone down, and tried to pull it up and couldn't pull it any distance at all; I never could get it to come back and stay back; I never could bring it up anyways near the original position; it was that degree of strength that I could not put it back into place with my hands.

The size of the opening in the floor was about two and a half by three feet and a half; the three and a half distance running across the car.

I did not see any floor in that car as thin as this piece shown me; none the size; possibly a little piece an inch back from the edges might have been as thin as that where it has been eaten out by rust; nothing any such width as the piece handed me, nowhere in the car I saw.

About eight inches of that flap, the piece that was broken down up next to the pipe was new break; there was about eight inches of new break, of solid steel, on the end next the pipe that was holding; that would indicate that that steel was solid and sound at that point.

As to whether considering what I saw of the break and the condition of that steel and the floor it looked reasonable to me that the weight of a man would have broken it, I don't think so; except for the fact that a man had gone through it I would not have thought that a man stepping on it would have broken it; it did not look reasonable to me; it looked like it would have held; I would have thought it would have held. Except for that break in the car and hole in that car I would have passed the car. First of all there was not hole enough in it (outside of the big hole) to justify holding up a load in transit; aside from the big hole those other holes indicated in the car were not of a character to indicate they were dangerous to men passing over it.

Cross-examination:

I am still with the Santa Fe as car inspector.

From the center or about the center of the car, extreme right hand side of the break next to the pipe back to the north side of the car or east side of the car is three and a half feet; that was about forty inches long, and with the exception of eight inches there was no new break whatever on that side of the hole; the other was all old break; had entirely rusted through.

I see the hole in the picture; it is rusted along there; rust had eaten through the floor at the point indicated.

That car was set out at Somerville in bad order. That piece of floor that had gone through was all in one piece; I left the piece of flooring on the car, I didn't bother with it; the car was bad ordered and unloaded. I don't think the bottom was repaired there; I don't think they could do it there; they possibly put a board over the bottom there before they sent that car back on the road.

[fol. 272] I did not take that piece out and save it; I don't know when that was finally taken off; I had nothing further to do with it. I did not preserve any part of the floor, and I have no part of it here.

Redirect examination:

I saw the floor and was specially told to examine it.

Recross examination:

I did not receive a telegram to inspect the car; the foreman received the message to inspect the car. I think that was before the car arrived, I am not sure now. I did not see the message; the foreman came up and he had the message, something in his hand, and told myself and Mr. Gaines that he wanted us to make inspection of a car on its arrival in Somerville. The train was there but it had not been set out. The train had just come, just pulled up there but the cars destined to Somerville had not yet been set out. I can't tell you whether or not the message came from Temple; I don't know where the message came from and I did not ask the foreman.

Redirect examination:

As matter of fact I don't know whether it was sent before or after the train got to Somerville on which Mr. Moser got hurt.

[fol. 273] C. C. Dickson, for defendant, testified:

That he handles the pay rolls at the superintendent's office of the G., C. & S. F. Railway Company at Temple, that is he did until the 1st of July, 1923.

I am familiar with the wages of trainmen; the rates at which they are paid. There were different rates of wages at different times in effect for trainmen from about 1919 to April 23, and from 1915 to December 31, 1917, there was no change in the rates, and the mileage rate for brakemen during that period was 2.28 per 100.

What we call the freight mileage rate for that period was 2.28 per 100 for brakemen.

Then for the period from January 1, 1918, to January 1, 1919, the rate was 3.88 per 100 miles.

General Order No. 727 covered an increase given the trainmen after the railroad administration took the roads over; after they took the roads over they raised the rate, and they raised the rate that had been 2.78 per 100 miles to 3.38 per 100 miles; raised it 1.10 per 100 miles; the local rate which had been $124.10 was raised to $171.60; and the work train rate which had been $75.95 per month was raised to $117.16 per month.

Then from January 1, 1919, until May 1, 1920, there was another scale of rates made, and the rate for brakemen for freight train service was 4.08 per 100 miles. That was under Supplement No. 15. That rate was 1.30 per 100 higher than the 2.75 rate and under that order salaries were abolished and everything was put on a mileage basis, and the local rate per mile was made 4.76 per 100, and for mixed trains 4.71 per 100, and for work trains 4.31 per 100.

From May 1, 1920, to July 1, 1921, there was another advance; Decision No. 2; that was by the government also, still under the railroad administration, and the freight rate that had been 4.08 was made 5.12, that is approximately a twenty five per cent raise I believe; 1.04 per 100 miles; and the local rate was also raised to 5.08; and the mixed train rate was raised 1.09 per 100 miles and made the same as the local; and the work train rate was raised about .94 per 100 miles. Those rates prevailed from May 1, 1920 to July 1, 1921.

As far as I know those were the highest rates ever paid railroad men in this country.

From July 1, 1921, until this date (the date of the trial) the rates prevailing and in force have been 4.48 in freight service; that had been 5.12; and the local 5.16 that had been 5.80 and the work train service 4.61 that had been 5.25.

Those are the rates now prevailing.

[fol. 274] Taking the mileage and overtime and whatever else went into the calculation of Mr. Moser's time and wages from July, 1921 to April 23, 1923, inclusive, that is during the last wage period, and figuring out what that same amount of mileage and overtime would have made for Mr.

interest prevailing for that character of loan, and it has prevailed in Dallas ever since I can remember, ever since I have been in business.

I can and do place money on real estate security at approximately fifty per cent valuation to net the lender eight per cent, and the borrower pays all the expenses; that is about the way loans are placed there; I have been placing it; I have no difficulty in placing money on that basis.

Cross examination:

Q. You are a business man, are you?

A. I suppose so.

I know something of the different character of investments made in this country by men of means. I know that loans which are made by the issuance of bonds for a period of time, safe and sound security on government bonds and on bonds of big concerns, loans of that kind are made not exceeding four per cent. And I also know that in the investment of any capital that experience and skill is required in making safe investments.

Redirect examination:

I furnish that experience to the people who trust their money to me to loan. I pass on securities for some of them; they can get that experience from prominent brokers without expense to them; perfectly responsible men who are in the business all the time, and the borrower pays the fee for the broker's trouble and all expenses.

[fol. 276] Recross examination:

I don't know that men of great capital and means who have opportunity to invest their capital in this country prefer to put it out at three and a half or four per cent instead of loans on town property.

W. W. Thomas, for defendant, testified:

That he resides in Houston and has been in the real estate business for forty years.

I do a general real estate business, selling real estate, making loans, renting property—just a general real estate business.

Money can be placed in Houston on real estate, good residence property, at approximately fifty per cent of its value and to net the lender on entirely good safe loans without risk to them, eight per cent, and it don't make any difference about the size of the loan. I place all the time loans that I pass on and consider safe of the type stated in the city of Houston. We used to get ten per cent back in the 80's and early 90's, but since that time the rate has been eight per cent.

Eight per cent is the prevailing rate now.

I have been in the real estate business since 1883.

I have been chairman of the board of Appraisement a few times; a citizen member one time, and I have been appraising for the city for seven or eight years, and I attend to that kind of business.

Vendor's lien notes and like securities are not rendered for taxation and are not taxed; may be one per cent of them are; I dare say it would not reach that.

Cross examined:

They do not render them. I say approximately there is only one per cent of notes rendered; as to how I know it, the records will show it; you have got to look at them; I have looked over them; for years I have looked over them. I say approximately one per cent, hardly that in my judgment of notes have been rendered for taxation.

I don't know how many notes are held in Houston by residents of Houston.

Q. And you don't know how many are rendered for taxation in Houston?

A. No, I didn't make a note of it.

Q. Do you know why it is that men of large capital and means in Texas and elsewhere prefer to invest their capital in three and a half to four per cent securities instead of intrusting it to you to loan for them in Houston?

A. I won't admit it.

[fol. 277] M. Maverick, for defendant, testified:

That he resides in San Antonio, and has resided *there* twenty-eight years; is in the lumber business.

I work for a lumber company that sells lumber and builds houses and finances houses.

Money can be placed in the City of San Antonio on safe, entirely safe, real estate security, residence houses, not exceeding fifty per cent valuation, net to the lender at eight per cent. As to the extent within the last few years that funds have been so loaned in the city of San Antonio, well for the last seven years of my personal knowledge it has been done, and to my knowledge by looking over the records that condition has run back for a period of years; it has always been at least eight per cent. Our concern has loaned in the last ten years an estimated amount of $10,000,000 at that rate and in excess of that; net eight per cent and some more.

There is no difficulty in placing money in safe securities in San Antonio now.

Notes of the character I am talking about are not assessed at all in San Antonio.

Cross-examination:

I mean to tell counsel that a man who makes loans in San Antonio, holds notes that are taxable by law, does not render them for taxation, I mean to say that. I don't know whether they do elsewhere or not. I know it because the city attorney made the ruling at one time that he would not assess vendor's lien notes, and in a previous administration about three years ago that subject was brought up and it was decided not to because it would be double taxation, without attempting to argue anything about the merits.

I can only approximate how many notes are held by residents of San Antonio, but it would be several millions of dollars; I dont know positively.

I don't know how many notes on San Antonio property are held by people in the east. Of course I have not gone over the renditions of San Antonio. I am making my answers on the basis of the ruling of the city attorney.

R. M. Anderson, for defendant, testified:

I am in the life insurance business. I have had experience as an actuary; I have been in the life insurance business about twenty years, having taken a four-year course in the University of Michigan in actuary science, and holding a position as actuary for fifteen years. That has been my line of work. My business now is life insurance but more in advising and selling, having gone into that branch of the business three years ago. The last company I was connected with as actuary was a life insurance company at Beaumont, and prior to that time I was with The American [fol. 278] National Insurance Company at Galveston. The American National is one of the largest insurance companies.

An actuary is one who investigates mortality experience and compiles figures on mortality tables and interest tables, figuring out any combination required, wherever the life of a man is concerned; in other words, figures out a basis on which insurance companies can write a particular character of risk on a scientific basis so that you know where you are a hundred years from now.

The American Experience Table of Mortality was first published in 1868 by a very renowned actuary by the name of Shepard Homans, who was at the time with the Mutual Life Insurance Company in New York. He compiled the table from actual experience, from the Mutual Life Insurance Company's records at New York. It was the first American table on mortality based on American risks. It was bound to have been based on accepted risks because it was the experience of the Mutual Life Insurance Company and they had only the experience of men who had taken life insurance and which they had accepted. That table is used in practically all of the states as a basis of valuation of life risks.

They have been working on more recent tables and there have been tables published but they are not in practical use.

The Carlisle Tables are not used now; they were used before the American Experience Table. They were predicated on British Experience, that is experience of life insurance companies in the British Empire; they were on accepted risks and they were not predicated on risks of people generally.

The Combined experience of Actuaries Table of Mortality was compiled by sixteen actuaries of Great Britain and from the experience of sixteen life insurance companies of the British Empire.

The American Experience table is the one generally followed in this country. Under that table the expectancy of a man twenty eight years of age is 36.73.

There is a difference made by the insurance companies when a man is employed as railroad brakeman and when a man is employed in the ordinary avocations of life. As to the difference, the table we use is based on selected risks of standard occupations not hazardous. Some companies will not take a railroad brakeman or one in an occupation as hazardous as that. Other companies will take railroad brakemen at the proper rate and they figure a straight premium which is based on the experience of mortality of the class. A few companies arrive at the same result by adding to the age of the man; that is, we add the extra premium in the majority of cases. The difference in expectancy has something to do with the extra premium; he has the expectancy of dying a natural death plus the probability of dying from accidental causes. The difference in the expectancy of a railroad brakeman and the expectancy of a man, farmer, merchant or a man in ordinary life, would figure around eight years at the age of twenty eight. We have to figure up that rate from the amount of extra premium we charge for that class of risk, and converting from extra premium to excess in years it amounts to eight years increase in age. A man twenty eight years old as brakeman for a railroad would be considered by life insurance companies, on account of the extra hazard, a man in that occupation has, an older man than that—we would add eight years to his age, making him thirty six, and his expectancy would be reduced from 36.73 to 31.7, that is his life would be shortened on account of the hazards of his occupation.

[fol. 279] By expectancy of a man's life, if I may use the illustration, some of you men have shot craps or thrown dice probably, and in doing that or thrown a coin we take the coin, it has two sides, we don't know whether one or the other is going to turn up and we can't tell which but we have an even chance it will turn up either head or tail; we know that. You take for instance a man twenty eight years, there are a certain number of men living, we will say 50,000, and we want to find out how many years that 50,000, each one of the 50,000, has an even chance of living, so we find out that half that number are living at a certain age and that will approximate the expectancy of life. That means a man of the age of twenty-eight years, with 50,000 living, there ought to be 25,000 of those men living in 36.73.

Q. Then do I understand that that is the average of what men of twenty-eight years of age, selected risks on whom you have data, taking the ones that have died and the ones who have lived and the whole bunch all the way through, and divide it by the number of people, and that is where you get the expectancy?

A. We work back by watching them as they did die each year.

Q. It does not mean that Mr. Moser will live thirty-six years but he may live beyond that and he may not live that long?

A. Yes, sir, he has a chance to live that many years.

By present value of $1.00 payable monthly for a given period, say ten years or fifteen years, you mean the amount we will have to have in hand right now which invested at a certain rate of interest will provide a fund which will pay a monthly income of $1.00 during that period and be entirely absorbed at the end of that period.

If $1.00 is paid every month for ten years that will mean an amount now invested at the stipulated rate of interest which will pay $1.00 for every month for ten years, and the last dollar will make the last payment; it will be less than $1.00 left for the last payment and the amount left and the interest on it will provide for the $1.00 for the payment at the last of the ten years.

I have figured up the present value of two-thirds of $1,800 for seven years, and $2,050 for sixteen years, and of $2,600 for fourteen years, a total of thirty-seven years, at the rate of six per cent per annum, would be on such present value $21,845.00. That would be the present value of two-thirds of $1,800 for seven years, two-thirds of $2,050 for sixteen years, and two-thirds of $2,600 for fourteen years. I arrived at that on the monthly paying basis distributed over a period of years. I took an average of the amount paid over a period of thirty-seven years and found the average monthly wage to be $184, and figuring contribution by assuming at least one-third of the income in a family of three would be used by the husband and father for his own expenses and upkeep, would leave an average monthly contribution of $123. And then I took the present value of $1.00 over that period of expectancy, 36¾ years, and multiplied the $1.00 present value by the $123 which would give me the present value of $123 paid every month over a period of 36 and a fraction years.

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Then with a family of three and an income of $1,800 a year for seven years, and $2,050 a year for sixteen years, and $2,600 a year for fourteen years, and allowing two thirds of that income to the wife and daughter, and figuring at six per cent the present value of the two thirds contribution to them would be $21,845.00.

At seven per cent it would be $19,439.00, and at eight per cent it would be $17,446, that is for 36¾ years, slightly over the expectancy.

[fol. 280] In arriving at these results I multiplied the $1,800 by seven years, the $2,050 by sixteen years and the $2,600 by fourteen years and added the results together and got the total amount which I divided by 37, which would give the average yearly earnings and divided by 12 which would give the average monthly earnings.

That would be $84,000 gross for that whole period, and figuring the one-third of the amount to be used by the father for his own upkeep it would make an average income about $2,200 per year, and contribution of about $16.34.

The present value of $1.00 per month for 36.73 years, the expectancy of one twenty-eight years of age at seven per cent is $177.60—the amount put at interest now at six per cent would pay $1.00 per month, the parties to receive it for 36.73 years, and the last payment will be just enough to pay the last one dollar.

At seven per cent the present value of the dollar for the same period would be $158.04, and at eight per cent would be $141.84 and having found the average, multiply the present value of one dollar by 123 and that will give you the totals I have stated.

Defendant here offered in evidence the memorandum of the calculations of the witness as follows, to wit:

"Present Value of Contributions Based on Income for Periods as Follows

$1,800.00 per year for	7 years.
2,050.00 per year for	16 years.
2,600.00 per year for	14 years.
Total	37 years.

and then determining an average monthly wage for the entire period which will show the average monthly wage to be $184.00. And, figuring contributions by assuming that at least 1/3 of income in family of three would be used by husband and gather for his own expenses and upkeep, leaves an average monthly contribution of $123.00, which, reduced to present value, will show as follows:

Present Value of $1.00 per Month for 36.73 Years, (Expectancy Age, 28)

6% $177.60 x 123.00	$21,845.00
7% 158.04 x 123.00	19,439.00
8% 141.84 x 123.00	17,446.00."

(fol. 281) Witness continues: At six per cent compound interest $10,000 will amount in ten years to $17,910, and in twelve years it will amount to $20,120, and in twenty years to $32,070, and in thirty years to $57,440.00.

$10,000 put out at eight per cent interest will pay $108.25 per month to parties that might be named and absorb itself in ten years; that is adding interest from year to year and taking off the monthly payment stated, the $10,000 will be absorbed in twelve years.

Cross-examination:

What is meant by expectancy is taking the lives of a thousand persons twenty eight years of age and taking the number of years those persons live thereafter, and taking the total, number of years altogether and dividing it by 1,000 you get the 36. Taking $1,800 for seven years, $2,050 for sixteen years, and $2,600.00 for fourteen years, the total earnings and not two thirds of it, and figuring the interest at four per cent, the present cash value is $12,416.00.

Redirect examination:

I have been connected with the insurance business in Texas eight years.

I have never seen an annuity sold in Texas by any life insurance company. From my own experience a fellow would not put money into an annuity, he could do so much better in another way.

Annuities are figured by insurance companies at three and a half and four per cent, and sometimes four and a half, but very seldom. They do not sell in Texas because money brings a better rate of interest than that down here.

Defendant rested.

Mrs. Olena Moser, recalled, testified:

Mr. Moser's health and physical condition before his death was very good. I do not remember of him ever being sick but once and that is when he had a slight attack of influenza. He never did go to the hospital. His mother said he was very healthy and he was very healthy and strong, nearly a two hundred pound man.

Testimony closed.

[fols. 282-332] Stipulation re Statement of Facts

It is agreed by and between the parties to the above entitled and numbered cause, that the above and foregoing is a true and correct statement of the testimony offered and facts proved upon the trial of the above cause at the October Term of the District Court of Bell County; and it is further agreed that on the trial of the cause there were offered in evidence certain photographs of the car in question, marked respectively exhibits "A", "B", and "C", and of the track at or about the place where deceased Moser's body was found after he had fallen through the car, marked exhibits "1", "2", "3", "4", and "5", which said photographs will be filed with the original of this statement of facts, and the transcript in the Court of Appeals, and it is agreed that they are and shall be taken as a part of this statement of facts.

(Signed) A. L. Curtis, Attorney for Plaintiff.
(Signed) Lee, Lomax & Wren, Attorneys for Defendant.

IN DISTRICT COURT OF BELL COUNTY

JUDGE'S CERTIFICATE TO STATEMENT OF FACTS

The above and foregoing having been agreed to by the parties to this cause as a true and correct statement of the testimony offered and the facts proven on the trial of said cause, same is now here approved and ordered filed as a statement of the facts in said cause and made a part of the record herein.

(Signed) Lewis H. Jones, Judge 27th Judicial District of Texas.

[File endorsement omitted.]

[fol. 333] IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

OPINION—Filed October 21, 1925

Suit of Mrs. Olena Moser as administratrix to recover for the death of her husband, John H. Moser, the action being under the Federal Statute, it being alleged, shown and admitted that Moser was a brakeman in the employ of the Gulf, Colorado & Santa Fe Railway Company at the time he met his death, and that both were engaged in interstate commerce.

There was a trial before a jury on special issues and judgment rendered for the plaintiffs in the sum of $34,000.00, apportioned $18,000 to Mrs. Moser and $16,000.00 to the minor child, Mary Virginia Moser.

Appellant's liability as found by the jury for Moser's death is not questioned on this appeal. Its brief contains 80 assignments of error followed by 58 additional propositions. We find nothing new or novel in the case, however, and shall not undertake to discuss the assignments in detail, but only to dispose of the issues raised, chief of which is that the verdict is excessive.

Appellant lodges numerous objections to that portion of the Court's charge for the jury's guidance in assessing the amount of damages. We have read carefully the charge and find that it lays down the correct rule as approved by the United States Supreme Court and the courts of this state. C. & O. Ry. Co. v. Kelly, 241 U. S., 485, 60 L. Ed. 1117; I. & G. N. Ry. Co. v. McVey, 99 Tex., 28. Appellant [fol. 334] labors at great length to show that the trial court did not instruct the jury to reduce such future contributions as appellees had a right to expect from the deceased, had he lived, to a present value. We find no merit in this. The language of the charge was that they should fix same "at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss, etc." The language, "at this time" clearly encompassed present value of future expectations. In addition, evidence as to annuities, interest rates, interest bearing investments, etc., was introduced for the purpose of determining such present value, and the case was tried on that theory. The main charge was sufficient.

Nor do we agree with appellant's contention that there was no evidence that the child could reasonably expect care, training, advice and counsel of her father which would be of pecuniary value to her. She was entitled to recover for such loss. I. & G. N. Ry. Co. v. McVey, supra. Of necessity the pecuniary value of such services is difficult to determine. When the character, education, habits and station in life of the father, the atmosphere in which his child is to be reared, and his affection for and interest in his child are shown, manifesting the fitness of the parent to furnish these elements, there was sufficient evidence to go to the jury on the loss of same; and it was within the sound discretion of the jury, with this light before them to pass upon their value. M. C. Ry. Co. v. Vreeland, 227 U. S. 59; 57 L. Ed. 417. See also I. & G. N. Ry. Co. v. McVey, 83 S. W., 34.

There was no error in permitting appellees to show Moser's earnings at the time of his death and during the years previous thereto while in appellant's employ as brakeman, nor that he had a reasonable expectancy of being promoted to a position as conductor with increased pay. The admissibility of such testimony has been expressly decided in this state (See Ry. Co. v. Stalcup, 167 S. W., 279; Hines, Director General, vs. Glasgow, 217 S. W., 1114). And in cases brought under the Federal Employers Liability [fol. 335] Act, in matters of procedure the law of the forum prevails. C. & O. Ry. Co. v. Kelly, supra. Hence the numerous cases cited by appellant and quoted from at length, from other states, have no application to this case. The evidence also showed that the matter of promotion of brakemen to conductors in appellant's employ was not left merely to chance or speculation, but was a fixed rule and policy, recognizing seniority among employes, and had been followed in years past. Ry. Co. v. Elliot, 149 U. S., 268; 37 L. Ed. 731.

Nor was there any error in permitting the appellees to show the rate of interest borne by United States Government bonds, and other safe securities, and the cost of annuities at such rate of interest. Long time investment of large sums of money in safe securities usually yield a lower rate of interest than smaller shorter term loans. The jury was not bound to accept the testimony of real estate brokers and money lenders that money could be made to yield a net rate of 8% on real estate security in Texas. Experienced business men, by the use of their skill and ability, and by reinvestments in small amounts might safely obtain a return of 8%. But in such cases it is the skill of the investor as well as the investment which goes to make up the return. The jury was not bound to accept any fixed rate of interest, not even a fixed expectancy in years, and could have concluded that for Mrs. Moser and her two year old child, deprived of both the support and counsel of the husband and father, a permanent investment in guaranteed securities at a low rate of interest was a proper basis for assessing the amount of damages. Such was their province. L. & N. Ry. Co. vs. Holloway, 246 U. S., 525; 62 L. Ed. 869.

We shall not undertake to discuss in detail the 27 special charges requested by appellant and refused by the court. Most of them were either already covered by the main charge or went to the weight of the evidence, and related to matters which were proper for argument to the jury. There was no error in refusal of the court to instruct the jury to confine the period of Mrs. Moser's recovery to that of her widowhood. Appellant admits that the Texas de- [fol. 336] cisions are against him on this contention.

Nor is there any merit in its contention that in arriving at the amount of Mrs. Moser's recovery, the jury should have been instructed to deduct from the value of his expected future contributions to her, the pecuniary value of her expected future services to him. Under appellant's proposition, if Mrs. Moser had herself been earning an income, and would probably have contributed services to him equal in value to his probable and expected services to her, she would have been entitled to recover nothing for his death. Or, as a reductio ad absurdum, if, as might be true in some instances, the pecuniary value of the services to be rendered the husband by the wife, should exceed the pecuniary value of the services to be rendered the wife by the husband, and the Railway Company should negligently kill the husband, under appellant's theory she would be indebted to the Company for his death.

Appellant cannot impeach the verdict of the jury nor insist that they did not follow the court's charge in arriving at their verdict without showing some misconduct of the jury under Art. 2021, R. S. 1911, Art. 2234, R. S. 1925. In the absence of such misconduct, the mental processes and calculations which guided the jurors, under the court's charge, in arriving at their verdict cannot be inquired into.

Appellant addresses six assignments to argument of appellees' counsel. No objection to such argument was made on the trial, no exceptions thereto appear in the record, and objection was raised for the first time in a motion for a new trial to which was attached a stenographic copy of both the opening and closing address of appellees' counsel to the jury. Under these circumstances these assignments will not be considered.

This brings us to the question of the excessiveness of the verdict. There being no error otherwise, and appellant's liability being fixed, we must view the verdict in the most favorable light of the evidence. There was evidence to show that J. H. Moser was 28 years old at the time he met [fol. 337] his death; that he was in good health, strong, sober, industrious, efficient, and when not employed, at home with his family; that during the preceding five years in appellant's employ he had earned an average over $2,000 a year; that according to United States mortality tables he had an expectancy of 36.73 years; that he would probably have been promoted to a conductor with an increase of pay within a few years, and had a reasonable expectancy of an average annual income of about $2,300 for the rest of his life, or an aggregate total expected income of about $84,000; that an annuity of $2,000 a year for 36 years would cost $36,720; that deceased loved his family and was devoted to his child. This case is in many respects similar to that of G. C. & S. F. v. Carpenter, 201 S. W., 270, in which this court held that a verdict for $35,000 was not excessive. In Freeman v. McElroy, where deceased was earning $75.00 per month at the time of his death a verdict for $22,500 was held not to be excessive. In Ry. Co. v. Pingenot, 142 S. W., 93, a verdict for $28,500 for death of a man 48 years of age earning $150 a month, in favor of his dependants was held not to be excessive. In Tex. P. & L. Co. v. Bristow, 213 S. W., 702, verdict for loss of deceased who was 31 years old and earning over $2,000 a year, in favor of wife and children for $28,000 was held not to be excessive. In Hines v. Mills, 218 S. W., 777, recovery by the wife and five minor children of a judgment for $40,000 for the death of the husband and father, a fireman 28 years of age and earning $185.00 per month, was not disturbed. In the light of the facts proven and the adjudicated cases, we are not prepared to say that the verdict for appellees for $34,000 is excessive. Nor was its distribution by the jury material to appellant. G. C. & S. F. v. Carpenter, supra.

Finding no error in the record the judgment of the trial court is affirmed.

Affirmed.

——— ———, Associate Justice.

[fols. 338-372] IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

Opinion by Associate Justice Baugh

JUDGMENT—October 21, 1925

This cause came on to be heard on the transcript of the record, and the same being inspected because it is the opinion of the Court that there was no error in the judgment; It is therefore, considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, Mrs. Olena Moser as Administratrix of the estate of Jno. H. Moser, do have and recover of and from the appellant, Gulf, Colorado and Santa Fe Railway Company, principal, and its sureties, J. Sealy and H. O. Stein, the amount adjudged by the Court below and all costs in this behalf expended, and this decision be certified below for observance.

IN COURT OF CIVIL APPEALS OF TEXAS

ORDER OVERRULING PETITION FOR REHEARING—November 25, 1925

Motion 6121; #6845. Gulf, Colorado & Santa Fe Railway Company vs. Mrs. Olena Moser et al. Appeal from Bell County. Motion for a rehearing. The motion is submitted and is overruled.

[fol. 373] In Supreme Court of Texas

No. —

Gulf, Colorado & Santa Fe Railway Company, Plaintiff in Error,

vs.

Mrs. Olena Moser et al., Defendant in Error

Petition for Writ of Error

Statement of the Case

Suit in the District Court of Bell County by the surviving wife of John H. Moser, as administratrix under the Federal Statute for damages resulting from the death of said Moser which occurred while he was a brakeman in the employ of the Gulf, Colorado & Santa Fe Railway Company, both he and the defendant at the time being engaged in interstate commerce.

It is alleged that while engaged in the performance of his duty at Lyons, Texas, and passing over train of the defendant, he fell through the floor of a car in the train and was run over and killed, the floor being claimed to be defective and dangerous in that it was made of steel which through use, wear or exposure had become rusted, etc., and was not sufficient to maintain the weight of a man. (Tr. 9-13.)

Trial before jury on special issues resulted in a judgment for Mrs. Moser, administratrix, in the sum of $34,000.00, apportioned $18,000.00 to Mrs. Moser and $16,000.00 to the one and only child, at the time of the trial 17 months of age. (Tr. 56-58.)

After motion for new trial in the District Court, appeal was properly prosecuted to the Court of Civil Appeals and the judgment affirmed.

Motion for rehearing was duly filed in the Court of Civil Appeals, which motion was overruled.

Grounds for Jurisdiction

This case is one as to which the jurisdiction of the Court of Civil Appeals is not made final by Article 1821 (1591 [fol. 374] R. S.), damages sought to be recovered by defendant in error exceeding $1,000.

The Supreme Court has jurisdiction of this cause, as your Petitioner conceives and avers, because:

I

This case involves the construction of a statute of the State, to-wit, Article 3234 of the Revised Statutes of 1925, Article 2021 of the former statutes, being Article 1371 of the Revised Statutes of 1895 as amended by Chapter 18, Acts of the 29th Legislature, page 31, providing in substance that where the ground for motion for new trial is misconduct of the jury that the court shall hear evidence thereof from the jury or others in open court and may grant a new trial if such misconduct is proved, the Honorable Court of Civil Appeals erroneously holding that the refusal of the jury to follow the instructions which the Court of Appeals holds the trial court gave to the jury, would not constitute misconduct on the part of the jury within the meaning of this statute and could not be considered by the court and did not constitute ground for reversal, although absolutely established by the testimony of the jurors.

II

The Honorable Court of Civil Appeals for the Third Supreme Judicial District holds differently from prior decisions of the Supreme Court of this State and of other Courts of Civil Appeals upon questions of law arising in this case as follows, to wit:

The Court of Appeals in this case holds that the disregard by the jury of the instructions that the Court of Appeals says was given by the trial court to the jury, to reduce the contributions that they found might reasonably have been expected by Mrs. Moser and her daughter from the continued life of Moser to a present value and the failure of the jury to apply such rule in the determination of their verdict in this case (that they did so disregard the charge of the court and fail to apply such rule being shown by the undisputed testimony of nine of the jurors) did not constitute misconduct under Article 2234 Revised Statutes of 1925, old Article 2021, and in so holding it holds differently:

(a) From the decision of this Court in the case of Harvey v. G. C. & S. F. Railway Co., recently decided, wherein it is held that the jury being directed by the Judge to disregard the legal effect of their answers to the questions submitted, that it was misconduct on the part of the jury requiring a reversal for the jury in violation of this express direction to make an agreement to give the defendant in error a certain sum as damages and then to answer the other questions so "she should get the money."

(b) From the decision of the Court of Civil Appeals at Waco in the case of Payne v. Smith, 266 S. W. 441 (quoted with approval by this Court in the Harvey decision), wherein it was held that it was misconduct on the part of the jury requiring a reversal of the cause for two of the jury to have considered the items of doctors' bills, nursing, medicine, etc., amounting to about $500.00 in disregard of, and contrary to the instruction of the Court directing them not to consider such items.

[fol. 375] (c) From the decision of the Court of Appeals at San Antonio in the case of San Antonio Traction Company v. Cassanova, 194 S. W. 1190, wherein it is held, as expressly stated by this Court in the Harvey case "that the action of the jury in disregarding the instruction of the Court was such misconduct as to require the granting of a new trial; the disregard of the instruction in the Cassanova case moreover not being as in this case the disregard of an express instruction, but consisting in the consideration of elements and items of damage that were not submitted by the charge of the Court—that is the disregard of that instance was negative and not affirmative, and yet it was held in that case that consideration of elements of damage not submitted by the jury, which was shown by the testimony of the jury themselves, was misconduct requiring reversal.

(d) From the decision of the Court of Appeals at Galveston in the case of Crystal Palace Co. v. Roempke, 227 S. W. 230, the holding being substantially the same as in the Cassanova case, wherein it was held misconduct on the part of the jury requiring the granting of motion for new trial where the jury considered hospital charges and doctor's fees when no such elements of damage were submitted to them by the charge, the misconduct on the part of the jury consisting in disregard of the court's charge and failure to follow the same in that they considered elements of damage not submitted by the charge.

(e) From the decision of this court in Hines v. Parry, 238 S. W. 887, where it is in effect held that the misconduct of a jury in conversing about the case with an outsider during the trial contrary to the provisions of Article 1960 Vernon's Revised Civil Statutes and communicating what was stated to the jury required the granting of a new trial, the effect of the holding being that violation of the charge and instruction of the Court constituted reversible error.

(f) From the decision of the Court of Appeals at San Antonio in the case of Foley v. Northrup, 47 Tex. Civ. App. 282, wherein it is held that under the Amendment of 1905, an agreement among the jury to a quotient verdict, each party setting forth what he thought ought to be allowed, and dividing it by twelve, could be shown, although it could not have been shown prior to that amendment; the conduct of the jury in the Foley case not falling within those provisions of the amendment as being misconduct of the officer in charge of the jury or being a communication made to the jury or being the result of reception of other testimony by the jury, falls necessarily within the first and general statement of the Statute, towit: "misconduct of the jury," and it is manifest that in order to determine such misconduct it would be necessary to inquire into both the mental processes of the jury and their calculations. While the Court of Appeals at Austin in this case holds that it can not inquire into such mental processes and calculations and in effect limits the misconduct that may be shown to those special provisions of the Statute where the grounds for the motion are: "misconduct of the officer in charge of the same (i. e. the jury), or because of any communication to the jury, or because the jury received other testimony," wholly disregarding and in effect eliminating the other broad and general provision of the Statute where the ground of the motion is misconduct of the jury," the Statute putting no limit to the inquiry except the question of whether the action of the jury is misconduct.

[fol. 376] (g) From the decision of the Court of Appeals at Galveston in San Antonio & Aransas Pass v. Wells, 146

S. W. Rep. 645, on similar grounds and for similar reasons, the Court of Appeals at Austin evidently overlooking the fact that the Amendment of 1909, as held by the Court of Appeals at Galveston, had abrogated and set aside that line of cases illustrated by the case of Texas Railway v. Ricketts, 96 Tex. 71, and the authorities there cited.

III

The Honorable Court of Civil Appeals for the Third Supreme Judicial District holds differently from the prior decision of the Court of Appeals at Galveston in G. C. & S. F. Ry. Co. v. Southwick, 30 S. W. 593, wherein it is held the defendant was entitled to have the jury instructed that in determining the value of the wife's services to her surviving husband the measure of damages would be the pecuniary value of her services "less the cost of suitably and properly maintaining her," while the Court of Appeals in this case holds that the defendant was not entitled to have the jury instructed that the amount of contributions allowed should be less the value of the services that the wife, the plaintiff, would have rendered the deceased, the husband, and of which she was relieved by his death. The underlying principle in the two cases is the same, to wit: that the true rule of damage is the difference between what is lost and what is saved or gained as the result of the act—compensation only be the limit of recovery.

IV

That errors of law have been committed by the Honorable Court of Civil Appeals at Austin of such importance to the jurisprudence of the State as require correction as follows, to wit:

(a) The Act of the 29th Legislature amending Art. 1371 of the Revised Statutes of 1895, which amendment is now Art. 2234 Rev. Statutes of 1925, was a remedial act providing the right of inquiry to litigants into the proceedings of jurors to ascertain and determine as to their misconduct, if any, which laid down a rule of procedure at variance with the rule theretofore established by the decisions of the courts and provided (the numerals in parentheses are inserted by us) that where the ground of the motion is (1)

' misconduct of the jury, or (2) of the officer in charge of the jury, or (3) because of any communication made to the jury, or (4) because the jury received any other testimony" that it shall be competent to prove such facts by the jurors upon examination in open court and if "(1) the misconduct is proven, (2) or the testimony received, (3) or the communication made, be material," a new trial may be granted. Yet, the Austin Court of Appeals holds in effect that a showing that the jury did not follow the rule laid down by the Court for the determination of damages is not a showing of misconduct and that the Court could not inquire into the mental processes and calculations which guided the jury, thereby practically nullifying the Statute, or at least that part of the Statute which permits an inquiry generally into the "misconduct of the jury," and confining the operation of the Statute to misconduct of the officer in charge of the jury or the matter of a communication being made to the jury or the matter of a reception by the jury of other testimony—so clearly cutting down and abridging the clear purpose and intent of the Legislature.

(b) It is settled by the decision of the Supreme Court of the United States in C. & O. v. Kelly, 241 U. S. 485, that in a case of this kind contributions reasonably to be expected [fol. 377] through a period of years must be reduced to a present value and in that connection the earning value of the money presently to be awarded must be taken into consideration and determined in reduction on the award. The verdict, considered in the light of the testimony taken on the trial and the testimony of the jurors themselves show that no attempt was made to reduce to present values or to determine the earning power of the amount presently to be awarded. In this the Court of Appeals holds there was no error, thereby sustaining the action of the jury below in following the rule laid down by the Court of Appeals of Kentucky condemned by the Supreme Court of the United States.

(c) The Court of Appeals holds that the use of the language by the trial court in his charge that the jury should fix the damages "at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss," i. e., that the language "at this time" in itself "clearly encompassed the present value of future expectations," and that the charge was not subject to objections that instead of the language used the Court should have told the jury that they would assess the plaintiff's damage "at the present value of the contributions in money," and that the Court should explain to the jury how the present value of such contributions may be determined under the evidence; and that it was not subject to the objection that it was generally too broad and not definite and specific enough and should in more detail have instructed the jury as to what amount they might consider and that more definite and specific instructions requested by the defendant applicable to the testimony were not required to be given, the result being that, as is manifest from their verdict and as clearly established by their testimony, the jury did not under the Court's charge to require any reduction to present values and made no such reduction.

(d) Contrary to the well established rule in this State, the Court of Appeals holds that it was not necessary to give clearer and fuller instructions on the measure of damages, in spite of the fact that the language of the charge was vague and indefinite and calculated to mislead and the particulars in which it was insufficient were specifically pointed out and full special instructions were requested.

(e) Because the Court of Appeals holds that the defendant was not entitled to have the jury instructed that in determining of their award in favor of Mrs. Moser the jury should take into consideration the value of the services that Mrs. Moser would have rendered to her husband had he continued to live and the rendering of which services she was relieved by his death. This ruling disregards the universal principle that damages must be confined to compensation and that if from the act from which a loss results there also follows a gain either by receipt of something that otherwise would not have been received or from relief from doing something that otherwise would have had to be done, that the benefit should be offset against the loss. [fol. 378] And further in that the Court of Appeals applied the same ruling in the matter of the child and held that the defendant was not entitled to have the jury in-

[fol. 459] IN SUPREME COURT OF TEXAS

[Title omitted]

JUDGMENT—January 20, 1926; filed in Court of Civil Appeals February 26, 1926

This day came on to be heard the application of Plaintiff in error for a writ of error to the Court of Civil Appeals for the Third District and the same having been duly considered, it is ordered that said application be dismissed for want of jurisdiction; that the applicants, G. C. & S. F. Ry. Co. and sureties, Sealy and H. O. Stein pay all costs incurred on this application.

IN SUPREME COURT OF TEXAS

CLERK'S CERTIFICATE TO ORDER DENYING PETITION FOR REHEARING

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said court, this the 25th day of February, 1926.

F. T. Connerly, Clerk, by B., Deputy.

I further certify that a motion for rehearing, by the plaintiff in error, was overruled in the Supreme Court on February 17th, 1926.

F. T. Connerly, Clerk Supreme Court. (Seal.)

[File endorsement omitted.]

[fol. 460] IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

PETITION FOR AND ORDER STAYING EXECUTION

To a judge of the Honorable Court of Civil Appeals for the Third District who participated in rendering the judgment in said cause:

Your petitioner shows and alleges the fact to be that it considers itself aggrieved by the decision of the trial court and by the decision of this Honorable Court in this cause and desires to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, this said cause being one in which your petitioner is entitled to apply to the United States Supreme Court for writ of certiorari in that this case arises under the Federal Employers' Liability Act enacted by the United States Congress.

Your Petitioner further represents and shows and charges the fact to be that unless it is granted a stay of execution and enforcement of said judgment, while your petitioner is applying for said writ of certiorari to the United States Supreme Court that execution may be issued against it.

In accordance with said Act of Congress, your petitioner tenders herewith good and sufficient security, conditioned as required by said Act and offers to comply with any and all requirements imposed by the law to enable it to remove said cause by certiorari to the Supreme Court of the United States.

Wherefore, your petitioner prays for stay of execution and enforcement of such judgment as provided for by Subdivision D of Section 8 of the Act of Congress of the United States of February 13, 1925, and which became effective May 13, 1925, to enable your petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States; and your petitioner prays that the Clerk of this Court and the officers of this Court, as well as the District Clerk and the appellee herein and her attorneys be stayed from getting out execution and enforcement of such judgment until your petitioner can apply for and obtain a writ of certiorari from the Supreme Court of the United States.

[fol. 461] Gulf, Colorado & Santa Fe Railway Company by
Lee, Lomax & Wren, Its Attorneys of Record.

In the above case upon this 18th day of March, A. D. 1926 the Gulf, Colorado & Santa Fe Railway Company, having duly presented the above application for a stay of execution and enforcement of the judgment heretofore rendered in the above cause for the purpose of applying for and obtaining a writ of certiorari from the Supreme Court of the United States, as provided for by the Act of Congress of February 13, 1925, and which became effective May 13, 1925, and it appearing that said petitioner from its application and under the law has the right to apply for said writ of certiorari from the Supreme Court of the United States, a stay of execution and enforcement of the judgment herein entered is granted for the time provided by the laws of the United States pertaining thereto, and upon the execution and approval of bond conditioned as required by law and upon the filing of such bond duly approved in the sum of Two Thousand Dollars ($2,000.00), the Clerk of this Court will not issue a mandate in this case, nor will any process to enforce such judgment issue until action of the Supreme Court of the United States on the petition for certiorari in this cause, or until it shall appear that application for certiorari to said Supreme Court of the United States has not been made within the time required by law; and said petitioner, the Gulf, Colorado & Santa Fe Railway Company is granted a stay of execution and enforcement of said judgment, and the Clerk of this Court nor anyone else, including appellee or anyone acting for her, shall be permitted to get out execution or enforce the judgment herein, except as provided for herein in this order.

James W. McClendon, Judge of the Court of Civil
Appeals for the Third Supreme Judicial District
of Texas and who sat in the rendering of the judgment in this cause.

[fols. 462 & 463] Bond on stay for $2,000, approved and filed March 18, 1926, omitted in printing.

[fols. 464 & 465] IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed March 15, 1926

It is agreed by and between the parties to the above entitled and numbered cause that in the transcript of the record as made up to accompany the application of the appellant, The Gulf, Colorado & Santa Fe Railway Company, for certiorari to the Supreme Court of the United States, that said appellant, the said Gulf, Colorado & Santa Fe Railway Company may direct the clerk to omit from the copy of brief for appellant for such transcript of the record and from the application for writ of error and the copy thereof for such record all statements and all argument and citation of authorities or so much thereof as in the opinion of said Gulf, Colorado & Santa Fe Railway Company and its counsel it is desirable and proper to omit for the purpose of shortening the record. And the appellee in this cause, Mrs. Olena Moser, by her counsel, here now joins in the request to the clerk to omit such portions of said brief of appellant in this court and of the application for writ of error to the Supreme Court of the State of Texas as may be requested by the said appellant, the Gulf, Colorado & Santa Fe Railway Company, and its counsel within the limitations herein stated.

(Signed) A. L. Curtis, Attorney for Appellee, Mrs. Olena Moser.

[File endorsement omitted.]

[fol. 466] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 467] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PETITIONER AS TO PARTS OF RECORD TO BE PRINTED

To the clerk of the Supreme Court:

Comes now the petitioner, Gulf, Colorado & Santa Fe Railway Company, and files a statement of the points on which petitioner intends to rely and in connection therewith designates the parts of the record which petitioner thinks necessary for the consideration of said points, with proof of the service of the same on respondent.

Points Upon Which Petitioner Intends to Rely

[fol. 468] (1) The brief and indefinite expressions of the Court's charge to assess the damages "at such sum of money as paid in cash at this time would be sufficient to fairly compensate the surviving wife and child" for the actual pecuniary loss, and they should find what amount of money "if paid in cash now would fairly and reasonably compensate the surviving widow, etc." are not sufficient to convey to the minds of an average jury the rules laid down by this Court in the C. & O. v. Kelly and C. & O. v. Gainey; that the charge as given is open to the defendant's objections that it was not definite enough and specific enough and that the jury should have been told that they would assess plaintiff's damage "at the present value of the contributions in money;" and should explain to the jury how such present value of such contributions may be determined from the evidence; and it did not give the jury any rule or formula by which they might determine the amount of money as if paid now would fairly and reasonably compensate, etc.

(2) Defendant was entitled to have its special charge No. 8 given, specially in view of the vague and indefinite expressions used by the Court in its charge on the question of reduction to present values. It is the definite holding of this Court in the Kelly case that "in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award;" and it was undisputed that money could be made to earn safely in Texas net 8%; but conceding that the right of the court to fix that as a rate might be open to question, it is certainly the law that it was the jury's obligation to reduce the contributions at the highest rate of interest they found the testimony showed could be had on money safely invested. The special charge as asked leaves it to the jury to determine what such rate was but charges them with

the obligation to determine such a rate and use it in reducing to present values.

(3) The record shows that the amount of the award will yield the plaintiffs throughout their entire lives at reasonable rates of interest even more than the annual earnings of the deceased and leave the principal intact at the deaths of the beneficiaries; and certainly under any rates of interest entitled to be considered, bringing every year during their lives more than any probable contributions of de- [fol. 469] ceased and still have their principal intact at their death, and it is absolutely clear that the rule of C. & O. v. Kelly has not been applied in this case and that the award is clearly in violation thereof and grossly in excess of what would be a proper award under the rule.

(4) The testimony of the jury shows unqualifiedly that the defendant's exceptions to the charge were well taken; that the jury would not understand therefrom that reduction to present value was required; and that as a matter of fact no attempt was made to reduce to present values; and that the award was made under the rule laid down by the Supreme Court of Kentucky and not under the rule of this Court.

(5) By the death of Moser his wife and child were relieved of service to him that the relationship cast upon them and defendant was entitled to have the jury instructed that such savings of service should be considered by them in reduction of any award they might otherwise make.

(6) That a woman as young as Mrs. Moser would marry again was altogether reasonable and the just and sound rule is that such probability should be considered by the jury in determining the damages.

(7) There was nothing in the evidence to show that Moser had by temperament or training any qualifications that would render any nurture, advice or training, a matter of pecuniary value. In any event, the only elements of that character that could be recovered for were such as had pecuniary value, that is, such as could be supplied by another for compensation and the jury should have been instructed such elements only could be considered.

(8) Defendant was entitled to have its special instructions given directing the jury to consider the probability, if any, of a reduction of wages by reason of return to normal conditions after the abnormal conditions of the War; the probable diminution of income reasonably to be expected from advancing age and from sickness and being out of employment, etc.; and the hazardous nature of the employment in which deceased was engaged.

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"That the earnings of said Moser by years was as follows:

Year	Amount earned
1918	513 33
1919	883 50
1920	2,433 07
1921	2,205 64
1922	1,675 46
1923	534 24
Total	8,245 24

That the earnings of said Moser for the period December 7, 1915 to December 31, 1917 were	$967 13
[fol. 473] For period January 1, 1918 to January 1, 1919	513 33
For the period January 1, 1919 to May 1, 1920	1,563 93
For the period May 1, 1920 to July 1, 1921	2,890 31
For the period July 1, 1921, to April 23, 1923	3,271 83

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 10, 1926

The petition herein for a writ of certiorari to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2374)

No. [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,

vs.

MRS. OPHELIA MOSER, ADMINISTRATRIX, *Respondent.*

PETITION FOR CERTIORARI, MOTION, NOTICE AND BRIEF

ALEX. BRITTON,
J. W. TERRY,
CHAS. K. LEE,
Attorneys for Petitioner.

[illegible]

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IN THE

SUPREME COURT OF THE UNITED STATES

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,
vs.
MRS. OLENA MOSER, ADMINISTRATRIX, *Respondent.*

PETITION FOR CERTIORARI

The Gulf, Colorado & Santa Fe Railway Company, chartered and domiciled in Texas, respectfully petitions this Court to grant it a writ of certiorari to the Court of Civil Appeals of Texas, Third Supreme Judicial District, at Austin, directing said Court to certify to this Court for review and determination the judgment of said Court affirming judgment in favor of respondent, Mrs. Olena Moser, Administratrix, in District Court Bell County, Texas, in suit of said Administratrix against Petitioner, a copy of the record in said cause being presented herewith.

Petitioner shows that important Federal questions, dependent upon the correct construction and proper application of the provisions of the Act of Congress known as the Federal Employes Liability Act, Sections 8657-8665, inc., U. S. Compiled Statutes, 1918, are involved particularly concerning the measure of damages recoverable and the rules by which amount of recovery is to be determined and as to the amount that may be awarded; and that by the erroneous ruling of the State Courts, particularly of said Court of Civil Appeals in the respects stated, Petitioner has been denied titles, rights, privileges and immunities set up and claimed by and under said Act; and said State Courts in that behalf have also decided Federal questions of substance not theretofore determined by this Court or has decided them in a way probably not in accord with applicable decisions of this Court.

SHORT STATEMENT OF THE CASE AND MATTER INVOLVED

Suit for death April, 1923, of husband of Respondent and father of an only child seventeen months old, resulting from floor of a steel coal car giving way as he passed over same in the discharge of his duties as a brakeman in employ of Petitioner (Rec. pp. 1-6), while car was enroute in Texas moving with a load of pipe from Pittsburgh, Pa. (Rec. pp. 89-90; 98-114), and so moving in interstate commerce as is alleged by plaintiff (Rec. p. 4), it being admitted by both parties in open court that both defendant and deceased were engaged in interstate commerce at the time of his death (Rec. pp. 81-82), death being charged to negligence of defendant, which was found by jury.

Moser was 28 years of age (Rec. p. 79), and if engaged in a non-hazardous occupation would have had an expectancy under American Experience Tables of 36.73 years (Rec. p. 92), but in hazardous occupation of brakeman, insurance companies reduced the expectancy to 31.7 years (Rec. p. 122).

From July, 1921, to his death Moser averaged $148.00 per month under wage scale then prevailing. During the high wage scale result of great war, stated by witnesses as being "the highest wages ever paid railroad men in this country" (Rec. p. 115), he made more than this a little more than a year, but prior to that time his monthly earnings were much below the $148.00 (Rec. p. 150).

C. C. Grazier, witness for plaintiff on basis of records kept by defendant, testified as to probabilities of promotion for Moser in substance that it would be about seven years before he would have been eligible for promotion to conductor; if he passed examination and was promoted he would still only be used as extra conductor and wages would not be much increased until he got a regular run, which would not occur for from fifteen to seventeen years from time he was set up as conductor; that is, it would be in the neighborhood of twenty-three years from time of death before he would get a regular run; that after promotion until he got a regular run he would generally run as brakeman and be used as conductor only in emergency, but amount of work done as conductor would increase as years passed and by the time he had been promoted ten years his reasonable earnings would be between $2100.00 and $2200.00, and the maximum he could expect to reach at time he got a regular run would be $2200.00 or $2250.00 (Rec. pp. 82-86); that if he got a regular run what he would make would vary with amount he laid off; if a steady worker it would run from $2500.00 to $2700.00 per year; that amounts stated were maximum reasonably probable for a man that works reasonably steady (Rec. pp. 86-87); that there was no probability of his ever getting to be a passenger conductor; too many ahead of him (Rec. pp. 86; 87-88).

These figures were not disputed and upon them defendant submitted to a qualified actuary a table of probable earnings of Moser made up on basis:

For seven years at $1800.00 per year—approximately what he had been making for 22 months prior to his death;

For sixteen years (average between 15 and 17), $2050.00 per year, a little more than an average between what he would start with and what he would have obtained by end of period, $2250.00;

For the remaining fourteen years of his full expectancy of 37 years (an average between $2500.00 and $2700.00) at $2600.00.

On basis these figures, to-wit, a gross income of:

$1800.00 per year for seven years,
$2050.00 per year for sixteen years,
$2600.00 per year for fourteen years

and on assumption that Moser would have spent at least one-third his earnings on himself for upkeep and expenses, the actuary testified for defendant that twohirds of such yearly income reduced to present value ould be, at 6%, $21,845; at 7%, $19,439; at 8%, 17,446. (Rec. p. 125.)

On cross examination plaintiff showed by witness hat present values same amount for same number of ears--total income, not two-thirds—at 4% would be 42,416.00. (Rec. pp. 125-126.)

By an insurance agent plaintiff showed that an-uity of $1800.00 per year for one 28 years of age t 4% would cost $33,048; and of $2000.00, $36,720; f $3000, $55,080. (Rec. pp. 92-93.)

Verdict of jury for $34,000, apportioned $18,000 to Irs. Moser and $16,000 to child (Rec. pp. 27-28), and udgment accordingly (Rec. pp. 28-29) affirmed by 'ourt of Civil Appeals and motion for rehearing over-uled (Rec. p. 132), and the application for writ of rror to State Supreme Court dismissed for want of urisdiction, and motion for rehearing there overruled Rec. p. 142).

The only other testimony bearing on the question f damages is:

That of Mrs. Moser that she was married in 1918; hat when Mr. Moser was off duty he was in habit of taying at home; loved his baby; loved to take her round; loved to stay at home and help her; had no ad habits; had just had a public school education; pent all his earnings on his family and did not send is parents anything; his physical health and condi-ion was good at time of his death. (Rec. pp. 78-79.)

And another lady testified that she knew Moser well; "knew him to be a good man, devoted father and husband, and a man who loved his family." Rec. p. 91.)

Case was submitted to jury on special issues, but court charged jury regardless of other questions they would assess damages and "arrive at the amount thereof by assessing the same at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of the said John H. Moser, if he had not died on the date alleged. By pecuniary loss is meant such loss as may be compensated for in money. In answering special issue No. 7, you will take into consideration the contribution of money and other pecuniary benefits, if any, which the evidence may show that said surviving wife and child would have received from him after the time of his death, if he had continued to live; and in estimating the pecuniary loss suffered by the minor child of the deceased by reason of his death, you may take into consideration such advice and training, if any, as the evidence may show that the child would have received from deceased after the time of his death, if he had continued to live," * * * but as to the minor they would confine themselves to such contributions as Moser might have made "to the period of her minority." (Rec. p. 21.)

Court then instructed jury not to consider society
nd companionship or grief or distress; "and in as-
essing the damages, if any, you will confine your-
elves solely to the determination of the pecuniary
nd monetary interest, if any, that plaintiff and her
hild, had in the continued life of the deceased."
Rec. pp. 21-22.)

Special issue No. 7 as submitted by the Court was
s follows:

> "What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they respectively suffered by reason of his death, if any? This question you will answer by stating the aggregate amount of such pecuniary loss or damage, and you will answer in the space below the amount you find from the evidence." (Rec. p. 22.)

Defendant objected to the court's charge on ground
at Court instead of telling jury that they will arrive
such sum as if paid in cash at this time will be
fficient to fairly compensate surviving wife and
ild, etc., should tell jury that they will assess dam-
e at present value of contributions in money (or
her thing of value if there be any other thing of
lue to be considered under the testimony, which de-
ndant denies) that they may find from evidence de-
ased would probably have made if he had continued
live, and explain to jury how such present value
such contributions may be determined under evi-
nce, confining them to that portion of evidence

which affords basis for determination of such present value (Rec. p. 24), and that charge was generally too broad, not definite and specific enough; that jury should have been more in detail instructed as to matters they should consider in line with defendant's requested charges (Rec. pp. 25-26), and because special issue does not give jury any rule or formula by which they may determine amount of money that if paid now would fairly and reasonably compensate surviving widow and child for actual pecuniary loss, etc. (Rec. p. 26.)

And the defendant asked among others a special charge (its No. 8) as follows:

> "In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining 'such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child,' for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased, you will make your calculations on the basis of the amount of your award bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and secured as shown by the testimony in this case," which was refused. (Rec. pp. 9-10.)

Defendant further requested instructions to the jury which the Court refused, submitting in substance:

That in determining of the amount of damages they would consider that it was the wife's duty to render such services to the husband as the relationship of wife reasonably imposed; and they would determine from evidence nature and character of such services as she would have rendered her husband and the draft that would have been made on her time, energy and strength to render such services, etc., and reasonable cash value of such time, energy and strength by reason of the death that was saved to her and made available to her to be used otherwise and credit on or deduct same from the present cash value of pecuniary contributions that Moser might have made to his wife, etc. (Rec. pp. 10-11); and a like instruction as to the services that child owed her father and might be relieved of by his death, etc. (Rec. pp. 11-12.)

That in determining damages sustained by Mrs. Moser they would take into consideration the reasonable probability, if such they found, of Mrs. Moser marrying again. (Rec. pp. 7-8.)

Defendant objected to Court's charge in so far as it submits elements of nurture, advice and training on grounds that there was no evidence that she would have received from him any nurture, advice or training of any character whatsoever; and that there was no evidence that any such nurture, advice and training had any pecuniary value, and if so what it was, or that it was capable of being compensated for in money (Rec. p. 25); and submitted a special charge withdrawing such elements from jury (Rec. p. 8); and another in the alternative that they would only consider such nurture, advice and training as was of a character that could be measured by money value; that is, such as could be supplied by the services of another for compensation. (Rec. pp. 12-13.)

Defendant also asked special instructions to jury in substance as follows:

That they would:

Take into consideration possible decrease in wages or earnings of deceased they may believe will reasonably result in future, if any, from return to normal from abnormal and unusual conditions, result of great war. (Rec. pp. 13-14.)

Take into consideration such diminution of his income as might reasonably result from loss of time from sickness or his being out of employment, etc. Rec. pp. 14-15.)

Consider the likelihood of earnings of deceased becoming less during latter years of his life. (Rec. p. 15.)

Consider hazardous nature of his employment and make such reduction of probable contributions as they believed ought to be made account thereof. (Rec. p. 16.)

Defendant offered the testimony of qualified experts from Dallas, Fort Worth, Houston, and from Temple in Bell County, where the case was tried, the witnesses testifying that, as to their respective localities, money could be placed on real estate security at approximately a 50% valuation of property at 8% net to lender; that such was prevailing rate, with no difficulty in placing loans—and that the skill and experience to make loans safely were furnished by the broker and he was paid a commission by the borrower. One witness testified that he had placed approximately Two Million Dollars in fifteen years with one foreclosure and no loss, and another that his concern had placed in ten years an estimated amount of $10,000,000.00 at the 8% rate. (Rec. pp. 79-81; 96-97; 117-122.)

There was no contradiction of this testimony but on cross examination of some of the witnesses it was developed by plaintiff that some large investments had been made in Government Bonds in the state and in other parts of the country on gilt edge securities at 3½% or 4% and that on choice business property money could be had at 6%. (Rec. pp. 80-81; 118.)

On hearing motion for new trial testimony of nine jurors was taken, (Rec. p. 61 to p. 77) and while the phraseology of witnesses is different they are a practical unit in saying that no attempt was made to reduce the contributions through the years to present values; that they gave no consideration whatever to the earning capacity of the sum of money presently to be awarded and did not understand from the Court's charge that any such process of calculation was required of them; and it appears absolutely that they followed the rule of Supreme Court of Kentucky in C. & O. v. Kelly, the rule condemned by this Court, taking as a basis for their verdict the sum of probable contributions through the years without attempt to reduce to present values.

They took different bases for calculation but all followed same process. One took earnings at $1800 per year and half of that as probable contributions, multiplying the $900 by 36, making $32,000.00 and "lopped it off" to $30,000.00 (Rec. p. 61); another $1000.00 per year for contributions, or $36,000.00 and knocked it down to $35,000.00 (Rec. p. 62); another two-thirds of $1800.00 or $1200.00 per year, multiplied by 36, making $43,200, lumped it off to $40,000.00 (Rec. p. 67), etc. One testified he understood charge required them to issue this lady a certain amount of money which would be sufficient to support her and her child (Rec. p. 62); another that he was at first for $40,000, figuring it would take that much to support this woman and child and educate this child, did not figure any rate of interest $40,000.00 could be made to make (Rec. pp. 64-65); another, the foreman, used as a basis for his verdict $1200.00 per year as contributions, was at first for $40,000.00, "a sum that could be drawn out without regard to anything being put out at interest at all—which would make up what he would have contributed to his family if he had continued to live," but did not go through any process of mathematical calculation and don't know that any of the jury did, according to rules of life expectancy or annuities, etc. (Rec. pp. 67-69); another: "the charge said to give her a sufficient amount of damage to educate the child and support Mrs. Moser and that is what I undertook to do" (Rec. p. 70); another: "I figured it was like this: that it was Mrs. Moser's business after the money was paid to her to do as she pleased with it and I thought that if she wanted to put it out at interest it was her business. The charge said to give her in a lump what was to keep her up and that child, that is the way I understood it. I made no allowance as to what that money could be made to earn." (Rec. p. 76.)

There is not the slightest suggestion anywhere in the testimony of the jurors that they considered anything else but the pecuniary contributions and not a single reference to the elements of advice, nurture, etc., to the minor child. (Rec. pp. 61-77.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The brief and indefinite expressions of the Court's charge to assess the damages "at such sum of money as paid in cash at this time would be sufficient to fairly compensate the surviving wife and child" for the actual pecuniary loss, and they should find what amount of money "if paid in cash now would fairly and reasonably compensate the surviving widow, etc.," are not sufficient to convey to the minds of a jury the rules laid down by this Court in *C. & O. v. Kelly* and *C. & O. v. Gainey*, 241 U. S. 485 and 494; that the charge as given is open to the defendant's objections that it was not definite and specific enough and that the jury should have been told that they would assess plaintiff's damage "*at the present value* of the contributions in money"; and charge should explain to the jury how such present value of such contributions may be determined from

the evidence; and it did not give the jury any rule or formula by which they might determine the amount of money as if paid now would fairly and reasonably compensate, etc.

(2) Defendant was entitled to have its special charge No. 8 given, specially in view of the vague and indefinite expressions used by the Court in its charge on the question of reduction to present values. It is the definite holding of this Court in the Kelly case that "in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award"; and it was undisputed that money could be made to earn safely in Texas net 8%; but conceding that the right of the Court to fix that as a rate might be open to question, it is certainly the law that it was the jury's obligation to reduce the contributions at the highest rate of interest they found the testimony showed *could be had on money safely invested.* The special charge as asked leaves it to the jury to determine what such rate was but charges them with the obligation to determine *such a rate* and *use it* in reducing to present value.

(3) The record shows that the amount of the award will yield the plaintiffs yearly throughout their entire lives at reasonable rates of interest even more than the entire annual earnings of the deceased and leave the principal intact at the deaths of the beneficiaries; and under any rates of interest entitled to be considered, bring in every year during their lives more than any probable contributions of de-

ceased and still leave the principal intact at their death. And it is absolutely clear that the rule of C. & O. v. Kelly has not been applied in this case and that the award is clearly in violation thereof and grossly in excess of what would be a proper award under the rule.

(4) The testimony of the jury shows unqualifiedly that the defendant's exceptions to the charge were well taken; that the jury would not understand therefrom that reduction to present value was required; and that as a matter of fact no attempt was made to reduce to present values; and that the award was made under the rule laid down by the Supreme Court of Kentucky and not under the rule of this Court.

(5) By the death of Moser his wife and child were relieved of service to him that the relationship cast upon them and defendant was entitled to have the jury instructed that such savings of service should be considered by them in reduction of any award they might otherwise make.

(6) That a woman as young as Mrs. Moser would marry again was altogether reasonable and the just and sound rule is that such probability should be considered by the jury in determining the damages.

(7) There was nothing in the evidence to show that Moser had by temperament or training any qualifications that would render any nurture, advice or training by him a matter of pecuniary value. In any event, the only elements of that character that could be recovered for were such as had pecuniary value; that is, such as could be supplied by another for

compensation and the jury should have been instructed elements of such character only could be considered.

(8) Defendant was entitled to have its special instructions given directing the jury to consider the probability, if any, of a reduction of wages by reason of return to normal conditions after the abnormal conditions of the war; the probable diminution of income reasonably to be expected from advancing age and from sickness and being out of employment, etc.; and the hazardous nature of the employment in which deceased was engaged.

Wherefore Petitioner prays for a writ of certiorari and upon hearing this cause be reversed with such orders as this Court deems proper under the law.

Respectfully submitted,

ALEX. BRITTON,
J. W. TERRY,
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Attorneys for Petitioner.

In the

SUPREME COURT OF THE UNITED STATES

Gulf, Colorado & Santa Fe Railway Company,
Petitioner,
vs.
Mrs. Olena Moser, Administratrix, *Respondent.*

BRIEF IN BEHALF OF PETITIONER IN SUPPORT OF FOREGOING APPLICATION FOR WRIT OF CERTIORARI

The decision of the Court of Appeals of Texas in this case will be found in 277 S. W. 722, printed record pages 127-131; and the judgment of the Supreme Court dismissing the application for want of jurisdiction is shown in foot note 277 S. W. 722 and in printed record page 142.

Action being expressly and solely to enforce a liability under the Federal statute, the questions presented are Federal.

St. L. I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 256, 57 L. Ed. 1179.

St. L. I. M. & S. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061.

Seaboard Air Line v. Duvall, 225 U. S. 477, 56 L. Ed. 1171.

Seaboard Air Line v. Horton, 233 U. S. 492, 58 L. Ed. 1062.

"The question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employes Liability Act it must be settled according to the principles of law as administered in the Federal Court."

C. & O. v. Kelly, 241 U. S. 485, 60 L. Ed. 1117.
C. & O. v. Gainey, 241 U. S. 494, 60 L. Ed. 1125.
North Carolina v. Zachary, 232 U. S. 248, 58 L. Ed. 591.

Where the record makes it evident that the case was tried contrary to decision of this Court in C. & O. v. Kelly, i. e., by taking the sum of the annual contributions through the period of expectancy without any attempt to reduce to present values, the judgment complained of must be reversed. *C. & O. v. Gainey*, 241 U. S. 494, 60 L. Ed. 1125.

(1)

The record makes it clear that the verdict in this case cannot be justified under the rules of the Kelly and Gainey cases and that it was arrived at by the application of the rules laid down by the Kentucky Court, condemned by this Court.

The data and table submitted to the actuary Anderson as a basis for figuring present values (App. 4) is as favorable to the plaintiff as could possibly have been asked. That it was so has never been challenged.

On the basis of this table, that is multiplying the number of years by the respective annual wage for the three periods, the total earnings would have been $81,800.00.

Plaintiff's counsel proved by the witness Anderson that the present cash value of these same earnings figured at the low rate of four per cent would be $42,416.00, that is to say that *the present value of the same earnings through a period of thirty-seven years was just a little over fifty per cent of the total of those earnings.*

The testimony of the jury shows that they followed the rule approved by the Kentucky court.

While there was a difference among the jury as to the amount of probable contribution per year, they all multiplied the annual contribution by the expectancy and set their verdict at approximately the result, knocking off small amounts to make round figures.

Moreover they figured generally that Moser would have contributed approximately one-half of his earnings to his wife and child.

Figured on this basis—i. e., that Moser would have contributed half his earnings for full 37 years to his wife and child—under Anderson's testimony as developed by plaintiff, that is at low rate of 4%—manifestly too low for Texas—the verdict would have been for $21,208 as against the $34,000 as rendered.

The jury considered nothing but Moser's earnings. No other element of damage is mentioned by them.

When it is considered that in making up the basic figures no deduction is made for probable sickness or vacations or on account of probable lessening activity with advancing years; or because the real expectancy in Moser's calling was approximately thirty-one years instead of thirty-seven; or that the amount to be awarded the minor should be calculated to her majority or approximately for nineteen years instead of thirty-seven, it is manifest that even a $21,208.00 figure is too much.

The amount of this verdict at eight per cent will yield $2720.00 per year; at seven, $2380.00; at six, $2040.00; at five, $1700.00; and at the rate that Government Bonds bear—four and one-half per cent, $1530.00 per year; at four per cent, $1360.00.

The total earnings for 37 years, $81,800, would average $2210 per year, and on the basis that the jury calculated (the contributions equal to approximately one-half of earnings) the average yearly contribution would have been $1105.

Then the verdict would yield at 4%, $255 per year more than this annual contribution; at 5%, $595 per year more; at 6%, nearly twice as much, etc., and in each instance the principal of the verdict will remain intact and unimpaired at the death of the beneficiaries.

Not only this, but as to the $16,000.00 awarded the minor, she gets her proportionate part of these incomes, nearly one-half, up to the year she becomes twenty-one years of age, and thereafter for the balance of her life and still will have the principal intact for her children at her death.

Defendant made its figures in the trial court on the extremely liberal basis to plaintiff of their receiving two-thirds of the annual earnings.

Two-thirds of the average annual earnings, $2210, as above figured, would be $1474.00 per year.

On this two-thirds basis the annual income on the verdict at 8% will be nearly twice the contributions; at 7% about $900.00 more; at 6% nearly $600.00 more; at 5%, $226.00 more, and at Government Bond rates, 4½%, $56.00 more per year, with the capital always unimpaired.

From thoroughly credible sources and without any contradiction whatsoever, the defendant showed that money could be safely loaned in Bell County and in other sections of the State—with ample demand—at eight per cent, without risk and without cost to the lender, the broker furnishing for a commission paid by the borrower, the requisite skill and judgment. This testimony being undisputed, we insisted in the court below that we were entitled to have the eight per cent rate used.

But certainly in the light of the record consideration of a rate lower than six per cent was unwarranted.

Under the testimony of Anderson, which is in no way questioned, two-thirds of the annual earnings figured at eight per cent would have a present value of $17,446.00; at seven per cent, $19,439.00; and at six per cent, $21,845.00.

And taking Anderson's figures developed by plaintiff, the same earnings, reduced to present value at four per cent have a present value of $42,416.00, and assuming that plaintiffs would have received two-thirds of the earnings, the present value of what they would receive being one-third less, would be $28,281.00, even figured on the whole thirty-seven year period.

And taking the cost of annuities as proved by plaintiff, or $18.36 for each dollar (testimony of Bassett, Rec. p. 93) and multiply this by $1474.00, two-thirds of Moser's average annual income under the table for the full thirty-seven years, gives a maximum verdict of $27,062.64 as against the $34,000.00 rendered.

So it is apparent from these figures that on the lowest bases suggested, the judgment is six to seven thousand dollars excessive, even though figured at an expectancy of thirty-seven years when thirty-one was the proper one, and without cutting it down to the period of minority or making any allowance for advancing age, sickness, etc.

At the rate of six per cent it is approximately $12,000, i. e., more than a reduction to present values will warrant, and at seven, about $15,000; and at eight, about $16,500.

Aside, therefore, from the testimony of the jury that no such rule was considered, the record makes it clear that the verdict was not reached by application of the rule of reduction to present value and that the verdict while guaranteeing plaintiffs every dollar of contribution that could be reasonably expected and more, will not, as required by the rule, *absorb itself*, but will *perpetuate itself* and will continue a fund that will yield the same annual rate for all time to come, being therefore, clearly in the condemnation of the Kelly case in that it affords more than compensation, being arrived at by aggregating the benefits without taking account the earning power of the money presently to be awarded.

Added to this is the clear and uncontradicted testimony of the jurors—nine of them—*that no attempt was made to reduce to present values*, and that the verdict reflects *only the sum of the contributions* reasonably to be anticipated.

In the cases of *L. & N. v. Trammel* (Ala.), 9 So. 870; *McAdory v. L. & N.* (Ala.), 10 So. 507; *Central Railroad v. Rouse* (Ga.), 3 S. E. 307; *A. & W. v. Newton* (Ga.), 11 S. E. 776, all cited by this Court in the Kelly case, and in the cases of *Chaffin v. N. & W.*, 93 S. E. 822; *Jones v. Kansas City Southern*, 78 So. 568; *Simmons v. L. R. & N. Co.*, 96 So. 12, citing and following the Kelly case, verdicts are analyzed under the records as we have undertaken to analyze the verdict in this case, and the verdicts condemned because of being manifestly more than present values, as we think clearly this verdict should be condemned.

In the very recent case of *Sipes v. Michigan Central* (Supreme Court of Michigan, decided June 15, 1925), 231 Mich. 404, 204 N. W. 84, the Supreme Court of Michigan says:

> "The amount awarded would yield an income, if placed at interest at 5 per cent, of $758.33 per annum, come within $3 of decedent's average yearly earnings, and at the end of 39 years the sum awarded would still be intact. In Chesapeake & Ohio R. Co. v. Gainey, 241 U. S. 495, 36 Sup. Ct. 633, 60 L. Ed. 1124, the widow had verdict for $16,000, and it was insisted that the award if placed at interest, would yield an annual income greater than the amount the widow would have received, and yet leave her the principal to dispose of at her death. It was held that such a result is not permissible."

(2)

The charge of the Court was not full enough to inform the jury the rule of the Kelly and Gainey cases —that the contributions to be expected through the years must be reduced to a present value by taking into consideration the earning power of the sum presently to be awarded; and defendant's exceptions should have been sustained and the charge made more full; and specially its charge No. 8 should have been given.

The Kentucky court in the Kelly case declined to apply the rule of reduction to present values because it regarded a jury as incapable of determining a verdict under such a rule.

This Court points out the fallacy of this position and undertakes to make clear to trial courts the rules by which the determination of a verdict in cases of this kind must be had.

And pertinent to the question in hand the following principles are laid down:

> "It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future."

That a verdict will afford more than compensation if it be made up by aggregating the benefits without taking into consideration the earning power of the money that is presently to be awarded.

That a person seeking damages must use reasonable care to lessen the damage.

That at this day the putting out of money at interest is so common a matter that ordinarily it cannot be excluded from consideration in determining the present equivalent of future payments, etc.

That local conditions are not to be disregarded.

That the principle of limiting the recovery to compensation requires that adequate allowance be made according to the circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only.

And in all cases where it is reasonable to suppose that interest may be safely earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

To convey all of these principles to the mind of a jury unlearned in the law and unfamiliar with such matters, and thought by the Kentucky Court not capable of considering them at all, it is held by the Texas Court of Appeals in this case that it is sufficient to use in the charge to the jury the brief talisman "at this time"; that these three words "clearly encompassed (meaning, we take it, were in themselves sufficient to convey to the mind of the jury the obligations to find, etc.), present value of future expectations."

The full language of the charge quoted by the Court as being sufficient, when aided by the three words quoted, is as follows: "At such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss," etc.

To a trained lawyer fresh from a reading of the Kelly and Gainey cases, the expression "at this time" *might* have been understood as an injunction to reduce to present values.

But that they would convey the same idea to an unlearned jury who knew nothing of the Kelly or Gainey cases, is a very different matter.

The emphatic, controlling words of the charge with the average jury naturally and practically always sympathetic with the injured party, specially a widow and children, are, we think, "such sum of money as * * * would be *sufficient* to *fairly compensate* the surviving wife and child," etc.

And the testimony of the jurors shows clearly that this was the controlling language with them.

Defendant made timely objection to the charge on the ground that the language used was not sufficient and that the charge "should tell the jury that they will assess the plaintiff's damage at the present value of the contributions in money * * *."

"To fix the damages at the present cash value of the contributions in money" is the expression of the charge asked in the Kelly case, and is certainly a very much clearer and more definite instruction than simply to refer to a payment "at this time."

But we asked further that the Court should explain to the jury how such present value may be determined under the evidence.

The defendant had laid before the jury in line with the suggestion of this Court in the Kelly case, accurate and well worked out data by which the present value could be determined.

This testimony was a thing of value to the defendant under a full charge by which the jury would have been advised as to their obligation with reference thereto.

But the practical ignoring of this line of proof and the absence of any instruction directly bearing upon it was calculated to entirely nullify its effect before the jury—as the testimony of the jury shows that it did; and the presence of the testimony therefore, did not aid the charge.

The charge is further objected to on the ground that it did not give the jury a rule or formula by which it might determine the amount of money if paid now that would fairly and reasonably compensate, etc.

Under Texas practice where timely objection is made to a charge and the defect in it pointed out, it is not necessary for the saving of the error that special instructions should also be asked. *G. C. & S. F. Ry. Co. v. Conley*, 113 Texas 473; *G. C. & S. F. Ry. Co. v. Locker*, 273 S. W. 831.

But in addition to the objections made to the Court's charge defendant asked a charge requiring the reduction to present values on the basis of 8%.

This Court said in the Kelly case that in *all cases where it is reasonable to suppose that interest may be safely earned upon the amount* that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

The undisputed testimony in this case showed that 8% could be safely earned in Bell County and in Texas upon the amount; and there was no contradiction of this testimony, and under the well settled rule that where testimony is undisputed the facts are to be taken as so shown (*Grand Fraternity v. Melton*, 102 Texas at page 402; *Hines v. Pennington*, 240 S. W. at page 704; *Hall v. Ripple*, 145 S. W. at page 311) defendant felt that it was entitled to have the reduction figured on an 8% basis.

But certainly defendant's special charge No. 8 (App. 8) was not open to the objectoins that might be lodged against the instruction as to 8%.

It directed the jury "to make their calculations on the basis of their award bearing interest at the highest net rate of interest that the testimony shows can be had on the money safely invested and secured, as shown by the testimony in this case."

This charge is directly based on the last quotation made from the opinion in the Kelly case.

It did not undertake to say what the rate should be. It did, however, require the jury to find a *safe rate* and to make a reduction *on the basis of that rate.*

And a safe rate being found by them there was certainly no discretion in the jury to figure out a lower rate, 1, 2, 3, 4, etc., per cent as they willed.

As applied to a court discretion means "sound discretion guided by law and must be governed by rule, not by humor. It must not be arbitrary, vague and fanciful" (Lord Mansfield, 4 Burrows 2539); it is to be exercised in determining the course prescribed by law; and, when it is discerned it is the duty of the court to follow it (*Osborne v. Bank*, 9 Wheat 737), and certainly an unlearned jury has not a wider discretion.

In *Seaboard Air Line v. Tilghman*, 237 U. S. 499, 59 L. Ed. 1069, where the question was as to a proper charge on the question of reduction of damages because of contributory negligence, this Court says:

> "No reference was made to the rule of proportion specified in the statute, or to the occasion for contrasting the negligence of the employee with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable."

The charge of the Court in this case is subject to the same condemnation.

(3)

The Court should have charged the jury that in determining their award they should consider the value of the services of the wife to the husband and of the child to the parent of which they were respectively relieved by the death.

It is well settled that in a suit by the husband for the death of the wife that the measure of damages would be the pecuniary value of the wife's services *less the cost of properly and suitably maintaining her.* *G. C. & S. F. v. Southwick*, 30 S. W. 593; *Gorton v. Harmon*, 152 Michigan 472, 116 N. W. 443; Corpus Juris, Vol. 17, title "Death", Section 233.

The same rule also applies in a suit for the death of a son or daughter. *Griffey v. Pac. Elec. Co.*, 209 Pac. 50; *Snyder v. Lake Shore & Michigan Central R. R.*, 91 N. W. 646; *McDonald v. Iron & Steel Co.*, 103 N. W. 829.

The reason the cost of maintenance should be deducted is of course because more than compensation would be awarded if the full value of the services of the wife or child were allowed without such deduction.

As a rule the wife does not maintain the husband, or the child the parent.

But the wife's services to the husband and the child's services to the parent are of value and they may be recovered for and very large amounts have been allowed on account thereof.

The rendering of such services requires time, energy and strength.

By the death of the husband the wife is relieved of those services.

That in some instances the value of the wife's services to the husband may be greater than the prospective pecuniary benefits, from his continued life, cannot change the rule. If the wife gains more than she has lost she is not entitled to be compensated.

Measured pecuniarily, the wife ordinarily has expectation of greater contribution and benefit than the husband, and there is no danger of a jury being too liberal to the defendant in determining the value of the wife's services in a suit by a widow for the death of the husband.

As pecuniary compensation is all that is to be awarded under the death statutes, a defendant is certainly entitled to have the jury consider in mitigation of damages the value of any benefit or relief that comes to the beneficiaries by reason of the death.

(4)

That the defendant was entitled to have the jury instructed to take into consideration the probability of Mrs. Moser's marrying again.

Mrs. Moser was just 27 (Rec. p. 79). So far as we have found, this question is an open one in the Federal Courts.

In the very recent case of *Sipes v. Michigan Central*, 231 Mich. 404, 204 N. W. 84, decided in June, 1925, the Supreme Court of Michigan, however, says:

> "The widow was 21 years of age at the time of the trial, and defendant requested the court to instruct the jury to consider, in fixing the period of loss of support, the possibility of her remarriage. This was covered by the tenth request, and was not given, nor the substance thereof included in the charge. The possibility of so young a person contracting another marriage should have been permitted to temper the thought of celibacy for 39 years. Jones v. McMillan, 129 Mich. 86, 88 N. W. 206."

(5)

There being nothing to show that deceased had any qualifications that would render any advice or training by him a matter of pecuniary value, or of such character as could only be supplied by another for compensation or that any training, advice or nurture he might furnish had any pecuniary value, such elements should not have been submitted to the jury, but they should have been instructed to disregard the same.

In *Michigan Central v. Vreeland*, 227 U. S. 59, this Court says:

> "When the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation. * * * In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent and that the child has been actually deprived of such advantages."

And in *American Railway Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456:

> "There was no allegation for any such loss, nor any evidence relating to the subject, or from which its pecuniary value might have been estimated. The scope of the compensation recoverable under this statute has been so fully considered in Michigan C. R. Co. v. Vreeland, decided January 20, 1913 (227 U. S. 59, ante, 417,

> 33 Sup. Ct. Rep. 192), that we need not say more."

In *Griffey v. Pacific Electric Company*, 209 Pacific 50, the Supreme Court of California considers at length the question of whether a father may, in an action for the death of his grown daughter, recover on account of loss of society and comfort and specially as those terms might involve the loss of advice and counsel, etc., and concludes that those elements could not be considered without proof of the daughter's special qualification to render service in that connection and its value.

And in *Sipes v. Michigan Central*, decided June 15, 1925, 204 N. W. 84, the Supreme Court of Michigan, while recognizing that the pecuniary loss of an infant might include the expense of supplying such degree of nurture and moral and physical training "as the evidence shows such parent was, by reason of ability, character and temperament, capable of giving," says:

> "Mere parentage does not carry such a showing.
>
> "Evidence relating to the nurture bestowed, and revealing the intellectual powers and moral character of the person, is available, and must be introduced to show the extent of what would have been supplied by the deceased had he lived, and, by reason of his death, need now be bought and paid for.
>
> "To measure what has been lost, it is necessary to consider the capacity of the parent to bestow. Without such light, the jury would

> have to apply their own standards, based on their individual experiences and these would, of necessity, 'be as various as their tastes, habits and opinions.' See Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C 176."
>
> "And the result would therefore be reached without considering the parent at all.
>
> "The evidence falls short on this subject and there was error in permitting the jury to assess damages for such a loss."

The evidence here clearly falls short of any showing by which the jury could measure what had been lost and any award they would make must rest solely upon mere parentage.

Proof such as was made in this case could be made in nearly any case. Nearly all men in this country of about Moser's age have been through high school and the great majority of American fathers, specially those of the middle class, are devoted to their children and like to be with them.

(6)

Defendant was entitled to have its special instructions given directing consideration in connection with the question of damages of the probable effect on deceased's earnings of a return to normal conditions after the abnormal conditions of the war; of the effect of advancing age and possible sickness, etc., and the hazardous nature of his employment, etc., and their probable effect on his earning capacity.

The undisputed testimony was in keeping with common knowledge, to-wit: that wages went to absolutely abnormal conditions during the war. There had been one decrease before Moser's death from this abnormal wage rate. That further reduction would come with the return to more normal conditions was among the probabilities and defendant was entitled to have the jury consider such probable reduction of wages as might be expected to follow.

In *Burns v. Railroad*, 68 Atl. 704, the Court condemned an instruction by the trial court because of its "disregarding the important fact that his earning powers were necessarily diminished as he advanced in years."

In *Glasgo v. Green* (Pa.), 117 Atl. 79, it is said:

> "Furthermore, earning capacity extending over a long term of years should be considered as in average rather than war times (Burns v. Pennsylvania R. R. Co., supra), and the decreasing capacity, with advancing years, should also be considered."

It is the testimony of the witness Anderson and is a matter of common knowledge that the calling of deceased, that is railroad brakeman, was extra hazardous. The very hazard of the calling is one of the elements that have made for the high rate of wages paid. It is incident to the nature of the calling and not necessarily traceable to negligence. The calling made a difference of about five years in the expectancy as figured by the Insurance Companies.

In *Jones v. Kansas City Southern*, 78 So. 568, and *Simmons v. L. R. & N. Co.*, 96 So. 12, the Supreme Court of Louisiana reduces the awards that it will allow by reason of the extra hazard of the calling.

Respectfully submitted,

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CHAS. K. LEE.

Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

Gulf, Colorado & Santa Fe Railway Company,
Petitioner,

vs.

Mrs. Olena Moser, Administratrix, *Respondent.*

In the Matter of the Petition of Gulf, Colorado & Santa Fe Railway Company for a Writ of Certiorari to the Court of Civil Appeals of the State of Texas for the Third Supreme Judicial District.

NOTICE OF MOTION AND APPLICATION

Please take notice that on or about the 19th day of April, 1926, the Gulf, Colorado & Santa Fe Railway Company, as petitioner, will file with the Clerk of the Supreme Court of the United States, a certified copy of the transcript of record herein and requisite number of printed copies thereof, together with its petition for a writ of certiorari, a copy of which, with the brief in support thereof, is hereto attached, and petitioners will move the motion hereto annexed before the Supreme Court of the United States, at the Capitol, in the City of Washington, District of Columbia, on Monday, the 3rd day of May, 1926, at the opening of the court on that day, or as soon thereafter

counsel can be heard, and that it will then and
ere move for such further relief in the premises as
ay be just.

Dated at Fort Worth, Texas, April 14, 1926.

ALEX. BRITTON,
J. W. TERRY,
CHAS. K. LEE.

Attorneys for Petitioner.

A. L. CURTIS,
Attorney for Respondent,
Mrs. Olena Moser, Administratrix.

ACKNOWLEDGMENT OF SERVICE AND AGREEMENT FOR SUBMISSION

Service and receipt of copies of the foregoing notice
l attached copy of motion and application for writ
certiorari and brief in support thereof hereby ad-
tted and accepted, this the day of April,
26; and I agree that the said motion, application
l brief may be submitted on Monday, the 3rd day
May, 1926, as therein provided.

Attorney for Mrs. Olena Moser,
Administratrix, Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

Gulf, Colorado & Santa Fe Railway Company,
Petitioner,

vs.

Mrs. Olena Moser, Administratrix, *Respondent*.

In the Matter of the Petition of Gulf, Colorado & Santa Fe Railway Company for a Writ of Certiorari to the Court of Civil Appeals of the State of Texas.

MOTION

Now comes the Gulf, Colorado & Santa Fe Railway Company, by Alex. Britton, J. W. Terry and Chas. K. Lee, its attorneys and counsel, and moves this court upon a certified copy of the transcript of the record herein and upon the annexed petition for a writ of certiorari to be directed to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, to bring before this Honorable Court the case of Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, vs. Mrs. Olena Moser, Administratrix, defendant in error, recently decided by said Court of Civil Appeals of Texas, for such proceedings therein as this Honorable Court may deem just, and for such other and further relief in the premises as may be just.

ALEX. BRITTON,
J. W. TERRY,
CHAS. K. LEE.

Attorneys for Petitioner.

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WM. R. STANSBURY

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1926

No. [redacted] 53

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,
vs.
MRS. OLENA MOSER, ADMINISTRATRIX, *Respondent*.

ON CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS,
THIRD SUPREME JUDICIAL DISTRICT.

BRIEF FOR PETITIONER

LAWRENCE H. CAKE,
J. W. TERRY,
CHAS. K. LEE,
Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. ....

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,
vs.
MRS. OLENA MOSER, ADMINISTRATRIX, *Respondent.*

On Certiorari to the Court of Civil Appeals of Texas,
Third Supreme Judicial District.

BRIEF FOR PETITIONER

The opinion of the Court of Civil Appeals of Texas in this case is reported in 277 Southwestern Reporter, 722; and appears in printed record at p. 127; and the judgment of the Supreme Court of Texas dismissing application for writ of error for want of jurisdiction appears in foot note, 277 Southwestern Reporter 722, and p. 142 printed record.

GROUNDS OF JURISDICTION

Judgment to be reviewed was rendered October 21, 1925 (R. 132).

This action was founded upon the Employer's Liability Act of Congress of April 22, 1908 (Chap. 149, 35 Stat. at L. 65), amended by Act of April 5, 1910

(Chap. 143, 36 Stat. at L. 291), same being Chapter E of the United States Compiled Statutes 1918, Sections 8657 to 8665, specially upon Section 8657 of said Compiled Statutes; action being by Mrs. Moser as administratrix to recover damages because of the death of her husband, who was alleged to have been employed as a brakeman by petitioner and at the time of his death through negligence of defendant, was engaged in the performance of his duties in interstate commerce. (R. 1-6.)

Petitioner claims that by the erroneous rulings of the State Courts, particularly of the Court of Civil Appeals, it has been denied titles, rights, privileges and immunities claimed under said Federal Act in that:

(a) The trial court did not instruct the jury as required by the decisions of this Court in *C. & O. v. Kelly* and *C. & O. v. Gainey*, 241 U. S. 485 and 494, that the contributions that deceased might have made to the beneficiaries through his continued life should be reduced to present value; and that the instructions given were not sufficient to convey to the minds of the jury the rules laid down in such cases; and that the jury should have been specifically told that they would assess plaintiff's damages "at the present value of the contributions in money"; and should have been given a proper rule and formula by which they might determine such present value; and should have been told that they should reduce the contributions to the present value at *the highest rate of interest they found could be had on money safely invested.*

(b) It is clear from the record that the rule of the Kelly and Gainey cases has not been followed in this case and that the award is clearly in violation of and in excess of what would be a proper award under the rule; and in that connection that the testimony of the jury shows that they made no attempt to reduce to present value—that they did not understand that such was required of them, and it is apparent from the record that the award was figured and made under the rule laid down by the Kentucky Court in the Kelly and Gainey cases, and not by the rule of this Court.

(c) The trial court erroneously failed to instruct the jury on the measure of damages, that they would consider in reduction of damages, the value of the services that the wife and child would have rendered the deceased had he not been killed; the probability, if any, of Mrs. Moser marrying again; the probability, if any, of reduction of wages of deceased by reason of return to normal conditions after the abnormal conditions of the war; the probable diminution of income of deceased reasonably to be expected from advancing age, sickness and being out of employment, etc.; and the hazardous nature of the employment in which he was engaged.

(d) The trial court erred in submitting to the jury the element of nurture, advice and training by the deceased father under this record as a matter of pecuniary value to the child.

CASES SUSTAINING JURISDICTION

Being an action brought expressly to enforce a liability under the Federal Statute, the questions are Federal.

> *St. L. I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 256, 57 L. Ed. 1179.
>
> *St. L. I. M. & S. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061.
>
> *Seaboard Air Line v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171.
>
> *Seaboard Air Line v. Horton*, 233 U. S. 492, 58 L. Ed. 1062.

"The question of proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employer's Liability Act it must be settled according to the principles of law as administered in the Federal Court."

> *C. & O. v. Kelly*, 241 U. S. 485, 60 L. Ed. 1117.
>
> *C. & O. v. Gainey*, 241 U. S. 494, 60 L. Ed. 1125.
>
> *North Carolina v. Zachary*, 232 U. S. 248, 58 L. Ed. 591.

STATEMENT OF THE CASE

Mrs. Olena Moser, setting up her appointment as administratrix of the estate of her deceased husband, John H. Moser (R. 2), brought suit against petitioner, the Gulf, Colorado & Santa Fe Railway Company, charging that at the time her husband received the injuries which resulted in his death defendant (petitioner) was engaged in commerce between the states and that her husband was employed by defendant "in such interstate commerce and at the time he received such injuries was in the performance of his duties under such employment" (R. 2); and that while so employed and acting as brakeman on the train of defendant and operated by it, he fell through the floor of a car and was run over and killed (R. 3); that she was the surviving wife and that he left one surviving child (R. 3); negligence being alleged in that the floor of the car had become so rusted, eroded and worn that it would not sustain the weight of a man stepping on the same, etc.; and that while in the performance of his duties Moser stepped upon the floor and fell through the same upon the track and received his injuries, etc. (R. 4.)

That Moser met his death by the iron or steel floor of a coal car giving way as he was passing over the car causing him to be run over and killed was established (Testimony of J. F. Francis, R. 89-91; E. E. Baldridge, 94-96; C. G. Tigler, 112-114), and the parties plaintiff and defendant agreed upon the trial in open court "that at the time of his death Mr. John H. Moser was in the employ of Gulf, Colorado & Santa Fe Railway Company as a brakeman on a train en route from Temple to Bellville, which train carried interstate freight and interstate commerce, and that the defendant was at that time engaged in interstate commerce as a carrier, and that the deceased Moser at the time he received his injuries resulting in his death was in the performance of his duties relating to interstate commerce." (R. 81-82.)

The car was a car of the Pennsylvania Railway System and it was shown by the testimony of defendant that it was in active service on the eastern railroads from about the 22nd of January, hauling heavy loads, coal, etc., till it was loaded in Pennsylvania with pipe about the 12th of April, for this trip (R. 98-102), and that it came to this defendant at Gulf Junction from the Atchison, Topeka & Santa Fe Railway (R. 102), and was given the usual inspection at Gainesville on defendant's line (R. 107-109) without the discovery of any defects that were regarded as dangerous or material and car was traced by defendant through its train crews from Gulf Junction to Temple, Texas, no defect that attracted notice being discovered by the crews (R. 102; 105; 106; 109 to 111), and the car was in a train out of Temple south when Moser met his death.

In answer to special issues under instructions of the court the jury found that while in the performance of his duty, Moser stepped upon the floor of the car in question, fell through and was killed; and that the defendant was transporting in one of its trains the car on which Moser was riding, the floor of which through use, rust or exposure was unsafe, and was negligent in so doing and that such negligence was the proximate cause of his death (R. 19-21).

As the questions presented relate only to the measure of damages, instructions thereon, given and refused, and the improper assessment thereof, from this point on this statement will be confined to the portions of the record bearing on the question of damages.

TESTIMONY AS TO MOSER'S EARNINGS AND THE VALUE THEREOF

The death of Moser occurred April 23, 1923. He was then 28 years of age (R. 79). If engaged in the ordinary avocations of life he would have had under the American Experience Tables an expectancy of 36.73 years (R. 122 and 92), but in the hazardous occupation of brakeman insurance companies reduce the expectancy to 31.7 years (R. 122).

At the time of Moser's death his wife was 27 and his child about two years old (R. 79).

For the period from July 1, 1921, to April 23, 1923, that is for the 21 months and 23 days prior to his death, Moser's earnings were $3271.83 (R. 150), or approximately $150.00 per month, under the wage scale prevailing.

At the peak of the high wage scale the result of the great war testified to as being "the highest wages ever paid railroad men in this country" (R. 150), he made a little more than this for a little more than a year (R. 150), but prior to that time his monthly earnings were much below $150.00 per month (R. 150).

C. C. Grazier, witness for plaintiff, testified:

That at the time of Moser's death he was the twenty-seventh man up for promotion as conductor.

"That promotion does not take place by any regular rule; no regularity whatever. The conditions upon which it depends vary right along. It is also true that the railroads are constantly using larger engines and larger trains that result in the movement of fewer trains, and this results in decrease of men needed. Then as larger equipment and larger power are used for economical use of railroads the chance of promotion for a particular man becomes less and less and becomes more remote."

That at the time of Moser's death the railroad had more men promoted than they needed—that three men had been promoted since his death (R. 83).

Taking into consideration the time he had been in service, the earliest probable time that he would have been in line for promotion would have been six or seven years or better (R. 84).

That being promoted did not mean he was going to commence running as conductor; "for a good long time after he was promoted he would very seldom run as conductor; would be on extra board and retain his rights as brakeman and the bulk of his work would be performed as such; that after passing his examination and being placed on the roster as emergency conductor he would be called upon if he is the oldest man available at the terminal; this would occur once in a great while in his early service as conductor; more often as time goes on; he still would perform brakeman service and the bulk of his work in the early years after promotion would be as brakeman (R. 84).

"That judging by his past experience Moser would not likely have had a regular run as conductor for from fifteen to seventeen years from the time he was promoted.

"That it was his estimate that it would be in the neighborhood of twenty-three years from the time of his death before he would have a regular run as conductor.

"That the probability of his ever getting to be a passenger conductor was very vague; promotion is slow due to increase in power, larger engines; the more cars we haul per engine, the less trains we run, and the less trains the less men; the probability of a man reaching promotion now as they did years back is very remote. It would be at least 23 years before Mr. Moser would receive a regular run as conductor; that would be through freight or chain gang service —the class of service the new men have to take in view of the fact that the older men take the best runs like locals. Taking these figures, Mr. Moser would have been a very old man if he ever reached a position of passenger conductor" (R. 85).

That there were 101 men on the roster between the man next in line for passenger work and Moser. "In my judgment there was not any reasonable probability of Moser ever reaching a passenger run."

"Ten years after Mr. Moser would have been promoted to be conductor, that is ten years after six or seven years from now—after he had been a conductor for ten years, and predicated on the present scale of wages, the ones prevailing now, taking into consideration the previous performance of other men for that length of time, I will state that the reasonable earnings of a man at that time would be between $2100.00 and $2200.00 per year. I am sure that it would be ten years after he had reached that period of earning capacity before he would get a regular run. It would be anywhere up to fifteen years or maybe better before he would get the regular run" (R. 86). That the maximum he could reasonably expect before he got a regular run would be about $2200.00 or $2250.00 (R. 86).

As to what he would get if he had a regular run in chain gang service as conductor "that would vary with the amount he laid off; if he was a steady worker it would run from $2500.00 to $2700.00 taking the entire year into consideration."

"If everything were all right with him then, for some twenty-five or thirty years, twenty or twenty-five years from the time of his death, he might get up to $2500.00 or probably a little better; that is based on my knowledge of what other men have done. It is true that there is a very great fluctuation in the amount that the men make. Business fluctuations, some men hold up better and keep better health, and some men are more steady workers than others. Some have more sickness and fall down. What I have stated is the maximum reasonably probable with a man that works fairly steady" (R. 86-87).

This testimony by Grazier and the figures offered by him were not disputed and defendant submitted on the trial to a qualified actuary a table of probable earnings of Moser made up on the basis thereof, as follows:

For the first 7 years from the time of his death, that is until he might be promoted, at $1800 per year—approximately what he had been making for twenty-two months prior to his death.

For 16 years (mean between the 15 and 17 years the witness figured it would be before he would have gotten to the point of making $2250.00 per year) at $2050.00 per year, this being a little more than an average between what he would start with, $1800.00, and what he would attain by the end of the period, $2250.00.

For the remaining 14 years of his outside expectancy (that is an expectancy of one in the ordinary walks of life—really not Moser's expectancy at all), a mean between $2500.00 and $2700.00—what the witness testified he might possibly make when he had obtained a regular run, or at $2600.00 per year.

On this basis these figures show for Moser a gross income:

For the first 7 years of $1800.00 per year.
For the next 16 years of $2050.00 per year.
For the next 14 years of $2600.00 per year.

On the assumption that Moser would have spent at least one-third of his income on himself—for his own upkeep and expenses—the defendant developed from the actuary the present value of two-thirds of Moser's possible earnings as above stated, to-wit: that the present value of two-thirds of such earnings

At 6% would be $21,845.00
At 7% would be $19,439.00
At 8% would be $17,446.00 (R. 125).

This witness explained in detail about the Mortality Tables and how they were made up and the difference made between the expectancy of men in ordinary vocations of life and those in hazardous callings and why, and what was meant by present values and how they were figured out and determined on, and on what basis and how he applied these figures to Moser's earnings as above set forth. (R. 121-125.)

The same witness testified that $10,000.00 at 6% will in ten years amount to $17,910, and in 12 years to $20,120, and in 20 years to $32,070, and in 30 years to $57,440.00 (R. 125).

On cross examination by plaintiff's counsel the witness testified: "Taking $1,800 for seven years, $2,050 for sixteen years, and $2,600 for fourteen years, the total earnings and not two-thirds of it, and figuring the interest at four per cent, the present cash value is $42,416.00." (R. 125.)

By an insurance agent plaintiff showed that an annuity of $1800 per year for one 28 years of age at 4% would cost $33,048; and of $2000.00, $36,720; of $3000, $55,080. (R. 92-93.)

Verdict of the jury was for $34,000, apportioned $18,000 to Mrs. Moser and $16,000 to child (R. 27-28), and judgment accordingly (R. 28-29).

The only other testimony bearing on the question of damages was:

Mrs. Moser testified:

"When off duty Mr. Moser was in the habit of staying at home. He loved his baby and loved to take her around, and loved to stay at home and help me.

"He had no bad habits.

"When off duty in Temple he always stayed at home with the baby. He was always called at home." (R. 78.)

Mr. Moser was raised out on the western branch of the Santa Fe.

"He had just had a public school education; had gone through the public schools at Valera" (R. 79).

And recalled she testified that Mr. Moser did not contribute any of his earnings to any other person than herself and her child; did not send his father money; "not in our married life, we needed it ourselves. He was not able to do anything for his father, in fact his father had helped us when we were first married." (R. 96.)

Mrs. N. A. Shanklin, for plaintiff, testified:

"That she knew John H. Moser in his lifetime; had known him for ten years; knew him well; knew him to be a good man, devoted father and husband, and a man who loved his family." (R. 91.)

TESTIMONY AS TO INTEREST RATES IN TEXAS

ED TEMPLE, a conductor in the employ of the Santa Fe, who lived at Temple, Texas, testified:

That he had been putting out money at interest at Temple, and had gotten eight to ten per cent with real estate as security, "safe security." The party borrowing the money paid the expenses. That he had been doing this for twenty years; that he was doing it at the time of trial; had no difficulty in putting it out at any time he wanted to. He put it out for others and helped them to put it out. (R. 97.)

BRIT STANTON, manager of the Cameron Lumber Yard at Temple, testified:

Cameron & Company in connection with their business sell vendor's lien notes on new residences and city property, and have been doing that there in Temple ever since he has been there—since 1919; for the last four years. Has been with the firm at other places and the same practice has prevailed.

"Up until the time the war came on we kept all that paper ourselves, because we considered it a good investment, but after the war it took so much more money to run our business, that we decided to discontinue that practice and what paper we have had since that time we have had it for sale.

"The rate of interest was eight per cent, that is what people who took it over from us got. The party who gets the money pays the expenses incident to the examination of title, passing on the loan, brokerage fees, etc. The eight per cent is net to the lender. The security is mechanic's or materialman's first lien on the house or property at approximately fifty per cent valuation of the property. The security of those loans is the very best of security."

(NOTE: This case was tried at Belton, county seat of Bell County, and Temple is the largest city in that county and is eight miles from Belton, where the estate was being administered, R. 2.)

JAMES HARRISON, for defendant, testified:

That he had been in the loan brokerage business fifteen years at Fort Worth, Texas, and during that time had loaned approximately two millions of dollars, original and renewed loans.

"Eight per cent had been the prevailing rate. I do not remember but one loan less than that; some few were placed at more than that, ten per cent, a very few. These loans were placed on real estate at about fifty per cent of the fair conservative price of the real estate. As to whether these loans were safely placed, I have only had one foreclosure in the notes I have handled, and that was $2,500 and the owner of the note was offered $3,000 after the foreclosure proceedngs; there has been no loss whatever.

"The borrower has invariably paid the expense of he loan, examination of title, recording fees of all papers, and all expenses whatever, and the eight per ent was net to the lender. I can place all I can get now at those figures, within a reasonable time; a man f course could not go out and place it on the spur of the moment. That is my business; I am doing that right along in Fort Worth."

On cross examination by plaintiff's counsel he testified:

"Q. You know that it is true that in large volumes in Texas and other parts of the country on gilt-edged securities money returns 3½ or 4½%?

"A. There is not as much loaned—there is more loaned at higher rates.

"Q. I am asking you if that is true?

"A. Some large investments have been made in government bonds of course.

"Q. Don't you know that in this country now that on any large loan of real estate that you can get all the money you want at six per cent?

"A. I don't know about that. On choice business property money is had at six per cent." (R. 80.)

On re-direct he testified:

"In placing this money for people who give me money to invest I give them the benefit of my judgment and experience in placing these loans and in protecting them and placing them; that is what I sell them; but it is paid for by the borrower." (R. 81.)

C. G. CLOUD, who had been in the real estate business in Dallas about fifteen years, testified:

That money could be placed in Dallas on real estate security, residence property, at an approximate fifty per cent valuation at eight per cent; "that is about the regular rate of interest prevailing for that character of loan," and had been ever since he had been in business. " * * * The borrower pays all the expenses. * * * That is about the way loans are placed there. * * * I have no difficulty in placing money on that basis. * * * I furnish the experience to the people who trust their money to me to loan—I pass on securities for some of them—they can get that experience from prominent brokers without expense to them, perfectly responsible men who are in business all the time. The borrower pays the fee for the broker's trouble and expenses." (R. 117-118.)

On examination by plaintiff's counsel, he testified:

"I don't know that men of great capital and means who have opportunity to invest their capital in this country prefer to put it out at three and a half or four per cent instead of loans on town property." (R. 118.)

W. W. THOMAS, residing at Houston, who had been in the real estate business there for forty years, making loans, etc., testified:

"Money can be placed in Houston on real estate, good residence property, at approximately fifty per cent of its value and to net the lender on entirely good safe loans without risk to them, eight per cent, and it don't make any difference about the size of the loan. * * * Eight per cent is the prevailing rate now."

On examination by plaintiff's counsel he testified:

"Q. Do you know why it is that men of large capital and means in Texas and elsewhere prefer to invest their capital in three and a half to four per cent securities instead of intrusting it to you to loan for them in Houston?

"A. I wont' admit it." (R. 119.)

M. MAVERICK, in the lumber business in San Antonio, working for a company that builds and finances houses, testified:

"Money can be placed in the City of San Antonio on safe, entirely safe, real estate security, residence houses, not exceeding fifty per cent valuation, net to the lender at eight per cent. * * * Our concern has loaned in the last ten years an estimated amount of $10,000,000.00 at that rate and in excess of that; net eight per cent and some more.

"There is no difficulty in placing money in safe securities in San Antonio now." (R. 120.)

Fort Worth and Dallas are to the North of Bell County; Houston, Southeast; and San Antonio, Southwest; and range from about one hundred thirty to one hundred fifty miles from Bell County, and being in different parts of the state may naturally, we take it, be taken as reflecting the market of the state.

In any event no testimony contrary to that given by these witnesses was offered, and the facts testified to by them are undisputed in the record.

CHARGE ON THE MEASURE OF DAMAGES

After submitting the issues covering the question of liability the court instructed the jury on the question of damages and submitted a special issue with reference thereto which, with the answer of the jury, was as follows:

> "Regardless of what your answers may be to the questions submitted in this charge, you will assess damages, and you will arrive at the amount thereof by assessing the same at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of the said John H. Moser, if he had not died on the date alleged. By pecuniary loss is meant such loss as may be compensated for in money. In answering special issue No. 7, you will take into consideration the contribution of money and other pecuniary benefits, if any, which the evidence may show that said surviving wife and child would have received from him after the time of his death, if he had continued to live; and in estimating the pecuniary loss suffered by the minor child of the deceased by reason of his death, you may take into consideration such advice and training, if any, as the evidence may show that the child would have received from deceased after the time of his death, if he had continued to live, but in determining the amount of damages that you may award, if any, to the minor Mary Virginia Moser, under this

charge and under special issue No. 7 and the apportionment of such award, you will confine yourselves in the consideration of such contributions that the deceased Moser might have made to his said minor child to the period of her minority.

"But you are instructed that you can not consider for any other purpose the solace or grief or loss of society and companionship suffered by the deceased's widow and child, or either of them by reason of his death, or for grief and distress on account of his death, and you can not award them or either of them any damages by way of solace or comfort for the death of the deceased; and in assessing the damages, if any, you will confine yourselves solely to the determination of the pecuniary and monetary interest, if any, that the plaintiff and her child had in the continued life of deceased.

"If you have answered special issue No. 5 'yes,' then you are charged and instructed that in assessing the damages, you will diminish the same in proportion as—find that such failure, if any, on the part of the deceased, to exercise ordinary care for his own safety contributed to the accident complained of.

"Bearing in mind the foregoing definitions and instructions on the measure of damages, you will answer special issue No. 7.

Special Issue No. 7

"What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they respectively suffered by reason of his death, if any? This question you will answer by stating the aggregate amount of such pecuniary loss or damage and you will answer in the space below the amount you find from the evidence.

"Answer. $34,000.00. J. E. Hudson, Foreman." (R. 21-22.)

OBJECTIONS TO THE CHARGE ON THE MEASURE OF DAMAGES

At the proper time and place defendant submitted objections to the court's charge which were in all things overruled (R. 26) as follows:

(a) The Court instead of telling the jury that they will arrive at such sum as if paid in cash at this time will be sufficient to fairly compensate the surviving wife and child, etc., should tell the jury that they will assess the plaintiff's damages at the present value of the contributions in money (or other thing of value, if there be any other thing of value to be considered under the testimony, which defendant denies) hat they may find from the evidence deceased would probably have made if he had continued to live, and hould explain to the jury how such present value of uch contributions may be determined under the evidence, and confining them to that portion of the evidence which affords a basis for the determination of uch present value. (R. 24.)

(h) Because said charge on the measure of damges is generally too broad and not definite and pecific enough and the jury should be limited in their consideration of the measure of damages, and the damages to be awarded, and should be further and more in detail instructed as to matters they can consider and the way their verdict should be arrived at more fully shown and in line with defendant's requested charges on the issue of damages. (R. 25-26.)

(a) (To special issue No. 7.) It does not give the jury any rule or formula by which the jury may determine the amount of money that if paid now will fairly and reasonably compensate the surviving widow and child for the actual pecuniary loss, etc. (R. 26.)

(d) Because said charge in so far as it submits to the jury the question of such nurture, advice and training, if any, as the evidence may show the child would receive from deceased if he had continued to live, because there is no evidence that the child would have received from the deceased any nurture, advice or training of any character whatsoever, there being no testimony upon the subject; and there is no evidence that he had any qualifications or training that qualified him to render service in the way of nurture, advice or training; or such would be of value, and there is no evidence that any nurture, advice or training that he might have given his child had any pecuniary value and if so what it was, or that it was capable of being compensated for in money. (R. 25.)

(e) Because the recovery for pecuniary benefits on the part of the wife, Mrs. Moser, is not confined to the period of her widowhood or until she may marry again, to be determined by the jury. (R. 25.)

SPECIAL CHARGES ASKED AND THE REFUSAL OF WHICH IS COMPLAINED OF

The special charges were asked at the proper time and place and proper bills reserved to the refusal to give. (R. 7-17.)

Special Charge No. 8

> "In considering of your verdict on the question of damgaes, and under the special issues submitted to you in that connection, and thereunder in determining 'such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child,' for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased, you will make your calculations on the basis of the amount of your award bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and secured as shown by the testimony in this case." (R. 9-10.)

Special Charge No. 9 (In Substance)

That the jury would consider the wife's duty to render service to her husband and determine from the evidence the character of service Mrs. Moser would probably have rendered as wife and the draft that would have been made on her time, energy and strength in rendering such service, and the rendering of which she was relieved by his death, and determine the reasonable present cash value of such service and deduct the same from the present cash value of the pecuniary contributions that Moser would have made to his wife had he continued to live, and that the difference between such values would constitute their award of damages under Special Issue No. 7. (R. 10-11.)

Special Charge No. 10 (In Substance)

Is special instruction in the same general form and to the same effect covering the feature of services that the child would be required to render to the parent and which was saved to her.

Special Charge No. 3 (In Substance)

Instructing the jury to consider the probability that "Mrs. Moser may marry again (and this question you may determine from your experience and judgment) and to confine the award of damages in her behalf to the period of her probable widowhood as they determine same." (R. 7-8.)

Special Charge No. 4

> "You are charged that under the law and the evidence in this case, you will not allow the plaintiff anything on account of any benefit for 'the benefit of a father's care, training, advice and counsel as set up in plaintiff's petition, and you will not allow the plaintiff anything on account of any such matters or take any such matters into consideration in determining your verdict." (R. 8.)

And in the alternative

Special Charge No. 11

"In the consideration of 'such nurture, advice and training, if any, as the evidence may show the child may receive from the deceased after the time of his death,' as such matters are submitted to you in charge, you will consider only such nurture, advice and training, if any, as of a character that can be measured by a money value, that is, such as could be supplied by the services of another for compensation, and in the assessment of damages, you will not allow anything on behalf of the minor plaintiff as to such matters except to the extent and insofar as you may believe from the evidence such nurture, advice and training will have to be supplied and will be supplied by the services of another secured for compensation." (R. 12-13.)

Special Issue No. 17 (In Substance)

That in determining the probable contributions they would consider possible decrease in wages or earnings, if any, as you may believe will reasonably result in the future, if any, from the return from the abnormal or unusual conditions the result of the great war the country has recently gone through, to normal or usual conditions, that is, such conditions as might reasonably be expected to exist when the influence of the war and the conditions arising out of it are removed, if you find that such a return will probably come, etc. (R. 13-14.)

Special Instruction No. 18 (In Substance)

That in determining the question of probable contributions they would take into consideration such reasonable decrease in his earning capacity as was reasonably to be expected from advancing age, and such diminution in his income as might reasonably result from such loss of time as he may have from sickness or any other cause, or the reasonable probability, if any, of his being out of employment from any cause (determining such matters in the light of your experience in human affairs) and you will give to each and all of such matters such consideration and weight in the determination of the amount of contributions deceased Moser would probably have made to his wife and child, as you think they are entitled to, etc. (R. 14-15.)

Special Charge No. 24 (In Substance)

That in determining the question of damages they would take into consideration the likelihood of the earnings of the deceased becoming less during the latter years of his life had he lived and also any period of the time that his earnings might cease due to sickness or any other causes, if any, that would in any way lessen his ability to contribute to his family, etc. (R. 15-16.)

Special Charge No. 25 (In Substance)

That they would take into consideration the hazardous nature of the employment in which Moser was at the time engaged and make such reduction of possible earnings as they think ought to be made. (R. 16.)

TESTIMONY OF THE JURY

Under Article 2234, Revised Statutes of Texas (old 2021) misconduct of the jury being charged in the motion for new trial (R. 49) the testimony of nine of the jurors was taken on the hearing of the motion and is set forth in bill of exceptions taken by defendant (R. 61 to 77).

Extracts from this testimony will be made sufficient to show clearly that the jury did not understand from he court's charge that they were required to reduce he contributions through the years to present value and considered no such matter and made no attempt o reduce to present value, and that the expression in he charge "at this time" did not remotely suggest to he minds of the jury that they were to reduce to resent value.

J. J. MILLER testified that on the first ballot he was or $30,000.00. As to how he arrived at his verdict he estified: "My process was taking $1800.00 as his arnings, as shown by the testimony, and I figured he ould spend half of that on himself, and I took the ther $900.00 which he would contribute to his family, nd took thirty-six years, his expectancy, and multilied that together, and that netted about $32,000.00, nd I lumped it off at $30,000.00. I made no attempt reduce it to a present value." (R. 62.)

T. E. HOUSE testified that on first ballot he was or $35,000.00. "As to how I arrived at that in my wn mind, as I understod the charge of the Court it harged us to issue this lady a certain amount of money which would be sufficient to support her and her child, and I felt it would take that to support her for thirty-six years, and a fraction over. * * * I figured $1000.00 a year for thirty-six years would be $36,000.00, and I knocked it down to $35,000.00. * * * I did not undertake to figure what interest the amount of money I allowed would bear; I did not understand the charge that way. I was just to find out the sum, the amount of contribution he would probably make during the years, that was the way I understood the charge. (R. 62-63.) * * * That was about the same method the other jurors were apparently using, several I know—multiplying the contribution by thirty-six years, his life expectancy, and endeavoring to arrive at a verdict in that way. Some differed as to what figure they would take as annual contribution, but everyone was using that same method as far as I know. (R. 63.) * * * I did not undertake to use any six per cent or seven per cent or eight per cent interest, to reduce the amount of my verdict to a per cent value; I did not understand it was my duty to do so under the Court's charge." (R. 63.)

M. L. HOUSE testified he was for $40,000.00. "I figured it would take that much to support this woman and support this child and educate this child. * * * I did not figure how much Mr. Moser would have contributed to Mrs. Moser at all; that was not in the Court's charge. (R. 64.) * * * I did not figure any rate of interest that $40,000.00 could be made to make, did not figure it at all. (R. 64-65.) * * * to see what she could make out of it. I did not take into consideration any earning capacity the money would bring; I just figured what it would take to support his woman and child; that is, if she had drawn from year to year out of the money that was given to her. * * * The Court did charge us that we should allow o the plaintiffs such an amount as if paid at this ime would compensate for the loss they had sustained by reason of his death. That is the way I tried to rrive at it. (R. 65.) * * * On the first ballot, without ny attempt by the jury to make any mathematical alculation, each juror merely wrote down what ver- lict he was in favor of. Six of the jurors were for 30,000, one for $35,000 and five for $40,000. At no ime did the jury enter into any mathematical calcu- ations figuring rates of interest or the values of an- uities or discuss any particular evidence along those ines." (R. 66.)

J. E. HUDSON, foreman of the jury, testified: "On he first ballot I voted for $40,000.00. As to how I rrived at that amount in my own mind, I sorter gured on the basis of what the man was receiving t the time of his death, $1,800 per year. (R. 66.) * * I thought he would give two-thirds of the $1800 o the family, something like that; about $1200 per ear to the family, and I multiplied that by thirty- ix, his expectancy: * * * $1200 by thirty-six years ould be $43,200 and I just lumped it off roughly at 40,000. * * * I don't know that I figured on about hat any amount of money would earn. Q. You just gured an amount that would be put in the bank and ould be drawn from year to year, considering that as his contributions of money to his family? A. I took into consideration what he made. Q. A sum that could be drawn out without regard to anything being put out at interest at all, which would make up what he would have been able to contribute to his family if he had lived, that is the idea? A. I believe it was. * * * I don't know that I took into consideration what that particular sum might earn at any rate of interest. * * * The process I went through, something of that kind, was about the process of all the jurors that I heard, I did not hear all of them; * * * the majority was finding a verdict by multiplying some sum by thirty-six and some odd years. (R. 67) * * * I knew that his total earnings, from the testimony would have run up to more than $80,000, based on $2300 a year; and I was merely trying to arrive at the present value paid in hand in cash at the time of the pecuniary loss which they had sustained, under the court's charge. I made no calculation whatever as to what money paid at this time might be made to earn." (R. 68-69.)

J. Y. MORELAND testified he was for $30,000. "I figured it would take something like that much to give the woman and child support, of course taking into consideration the salary the man was drawing; $1800 a year I believe was what was figured. * * * I considered something like $900 a year for thirty-six years. * * * and in round numbers I voted for $30,000. * * * I did not figure it at seven or eight per cent or any other rate that the money could be made to bear. (R. 69.) * * * I had an idea what that money would earn—$30,000 a year, I knew it would earn $1800 at ix per cent. I did not figure what amount, if paid ow, taking $900 as a basis per year, if put out at nterest would absorb itself at the end of thirty-six ears." (R. 69-70.)

E. W. DUNLAP testified on first ballot he was for 30,000. "I just figured that it would about take that o do what the judge said for us to do. The charge aid to give her a sufficient amount of damage to ducate the child and support Mrs. Moser, and that what I undertook to do when I first thought of 30,000 as my vote. Mr. Moser's earnings and what e would make did not have anything to do with it. R. 71.) * * * I did not at that time undertake or try reduce annual payments of so much per year by eans of contributions each year to a present value figuring how much money that money could be ade to make. I did not figure that at six per cent seven or eight per cent or any other per cent. . 71-72.) * * * The charge just said to give her ough damages to educate the child and take care Mrs. Moser. That may not be the words, but I ink that is the substance of the charge. * * * I un- rstood we should take into consideration what he s earning and should pay them at this time what uld justly compensate them for the pecuniary loss y had sustained. I did not undertake to give to m what I thought he would contribute to them dur- his entire life if he had lived, but to pay them at s time what would justly compensate them for the s they had sustained." (R. 72.)

R. N. CASS testified he was for $30,000. "We did consider how much he might have contributed each year to his wife and child, and as near as I remember it, multiplied that by thirty-six years that he had to live. * * * I did not make any calculation at interest at eight per cent or six or seven per cent. I made no attempt to reduce the payment paid annually to a present value—to calculate how much if paid now would amount to the same as a payment made each year at a given rate of interest." (R. 73-74.)

R. H. GILES testified on the first ballot he was for $40,000. "I just figured it would take that much to maintain this woman and educate that child, I believe the man would have done it, had be lived. * * * The charge of the court was that we would give this woman an amount that would maintain her and this child, and that is what we undertook to do. I considered that he would have contributed to his family about half of his income anyway, and multiplying that by thirty-six would be something around $40,000, more than that; that is about the way I figured it in my mind. Wasn't anything said about interest, and I did not attempt to reduce it to a present valuation." (R. 75.)

J. F. DUBOSE testified he was for $40,000. "I did make calculations in my head; the charge says that we were to do that and I believe Mrs. Moser, the way the present living was, that it would take $40,000 to keep Mrs. Moser and the little girl up and educate the girl. That is the way I arrived at it as near as I can tell you now. I did not figure any interest because the charge did not say so. I don't believe I did figure any interest. I figured it was like this: that it was Mrs. Moser's business after the money was paid to her to do as she pleased with it and I thought if she wanted to put it out at interest it was her business; the charge said to give her in a lump what was to keep her up and that child, that is the way I understood it. I made no allowance as to what that money could be made to earn; I did not consider it that way." (R. 75-76.)

SPECIFICATION OF ERRORS ASSIGNED AND INTENDED TO BE URGED

(1) The brief and indefinite expressions of the Court's charge to assess the damages "at such sum of noney as paid in cash at this time would be sufficient o fairly compensate the surviving wife and child" for he actual pecuniary loss, and they should find what mount of money "if paid in cash now would fairly nd reasonably compensate the surviving widow, etc.," re not sufficient to convey to the minds of a jury the ules laid down by this Court in *C. & O. v. Kelly* and *. & O. v. Gainey*, 241 U. S. 485 and 494; that the harge as given is open to the defendant's objections hat it was not definite and specific enough and that he jury should have been told that they would assess laintiff's damage "*at the present value* of the conributions in money"; and charge should explain to he jury how such present value of such contributions ay be determined from the evidence; and it did not ive the jury any rule or formula by which they

might determine the amount of money as if paid now would fairly and reasonably compensate, etc.

(2) Defendant was entitled to have its special charge No. 8 given, specially in view of the vague and indefinite expressions used by the Court in its charge on the question of reduction to present values. It is the definite holding of this Court in the Kelly case that "in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award"; and it was undisputed that money could be made to earn safely in Texas net 8%, but conceding that the right of the Court to fix that as a rate might be open to question, it is certainly the law that it was the jury's obligation to reduce the contributions at the highest rate of interest they found the testimony showed *could be had on money safely invested*. The special charge as asked leaves it to the jury to determine what such rate was but charges them with the obligation to determine *such a rate* and *use it* in reducing to present value.

(3) The record shows that the amount of the award will yield the plaintiffs yearly throughout their entire lives at reasonable rates of interest even more than the entire annual earnings of the deceased and leave the principal intact at the deaths of the beneficiaries; and under any rates of interest entitled to be considered, bring in every year during their lives more than any probable contributions of deceased and still leave the principal intact at their death. And it

is absolutely clear that the rule of C. & O. v. Kelly has not been applied in this case and that the award is clearly in violation thereof and grossly in excess of what would be a proper award under the rule.

(4) The testimony of the jury shows unqualifiedly that the defendant's exceptions to the charge were well taken; that the jury would not understand therefrom that reduction to present value was required; and that as a matter of fact no attempt was made to reduce to present values; and that the award was made under the rule laid down by the Supreme Court of Kentucky and not under the rule of this Court.

(5) By the death of Moser his wife and child were relieved of service to him that the relationship cast upon them and defendant was entitled to have the jury instructed that such savings of service should be considered by them in reduction of any award they might otherwise make.

(6) That a woman as young as Mrs. Moser would narry again was altogether reasonable and the just ind sound rule is that such probability should be con- idered by the jury in determining the damages.

(7) There was nothing in the evidence to show hat Moser had by temperament or training any quali- ications that would render any nurture, advice or raining by him a matter of pecuniary value. In any vent, the only elements of that character that could e recovered for were such as had pecuniary value; nat is, such as could be supplied by another for mpensation and the jury should have been instruct-

ed elements of such character only could be considered.

(8) Defendant was entitled to have its special instructions given directing the jury to consider the probability, if any, of a reduction of wages by reason of return to normal conditions after the abnormal conditions of the war; the probable diminution of income reasonably to be expected from advancing age and from sickness and being out of employment, etc.; and the hazardous nature of the employment in which deceased was engaged.

NOTE: The assignments or points upon which petitioner intends to rely as set forth above were raised by motion for new trial in the District Court (R. 29-49) and carried forward as assignments of error under the Rules of Practice in Texas Courts and by appropriate propositions, statements, etc., presented in the Court of Appeals of Texas (R. 152), and such points were presented to the Supreme Court of Texas in the application for writ of error (R. 133-141) with propositions and statements and arguments and authorities thereunder, presenting such points to such Supreme Court (R. 133-141 and 152), and motion for rehearing in such Court of Civil Appeals and such Supreme Court made in the time required by law, and such points intended to be relied on as above set forth were re-urged before said courts. (R. 153.)

ARGUMENT

Summary

(1) It is evident from the record that the verdict in this case was reached without any attempt to reduce the contributions through the years to a present value—that is that the verdict was determined on the rule laid down by the Kentucky Court in the Kelly case and condemned by this Court, and therefore, under the rulings in *C. & O. v. Kelly* and *C. & O. v. Gainey*, the judgment below must be reversed.

(2) The testimony of the jury absolutely confirms this clear deduction from the record and establishes affirmatively that the rule of the Kentucky Court was followed and the rights of this defendant under the rulings in the Kelly and Gainey cases wholly ignored.

(3) That the charge of the court did not properly or fully present the rule of the Kelly and Gainey cases—that is that the contributions to be expected through the years must be reduced to a present value, by taking into consideration the earning power of the sum presently to be awarded—indeed, did not carry this rule to the jury at all; and the defendant's objections to the charge should have been sustained, and the rule presented in such manner that there could be no doubt about the jury understanding it.

(4) That the requested special charge No. 8 telling the jury specifically that in determining the present value of the contributions that they would make their calculations on the basis of the amount of their

award bearing interest at the highest net rate of interest that the testimony showed could be had on money safely invested and secured.

(5) That the court should have instructed the jury as requested by defendant, that in determining their award they would make deduction and allowance for the value of the services of the wife to the husband and of the child to the parent, of which the wife and child were respectively relieved by the death.

(6) That the court should have instructed the jury as requested by defendant to consider the probability of Mrs. Moser marrying again, and confine her damages, if any, to the period of her probable widowhood.

(7) That under the record in this case, there being nothing to show deceased had any qualifications that would render any advice or training by him a matter of pecuniary value or of such character as could only be supplied by another for compensation; or that any training, advice or nurture that he might furnish had any pecuniary value, such element should not have been submitted to the jury but they should have been instructed to disregard the same.

(8) That the trial court should have given the special instructions requested by defendant directing the jury to consider in connection with the question of damages the probable effect on deceased's earnings of a return to normal conditions after the abnormal conditions of the war; and of the effect of advancing age and possible sickness, etc., and the hazardous nature

of his employment and their probable effect on his earning capacity.

The Act of Congress cited above, Compiled Statutes 1918, Section 8657, provides an action for employes of common carriers engaged in interstate commerce in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence.

This Act does not lay down any express measure of damages but "the damages are such as flow from the deprivation of pecuniary benefits which the beneficiaries might have received if the deceased had not died from his injuries." (*Michigan Central v. Vreeland*, 227 U. S. 59, 57 L. Ed. at page 422.)

1.

It is apparent from the record that the verdict in this case was arrived at on the basis of adding together—aggregating—the probable annual contributions without any attempt to reduce to present values and in total disregard of the rules laid down in the Kelly and Gainey cases.

The data and table submitted to the actuary Anderson as a basis for figuring present values (Supra

p. 11) is as favorable to the plaintiff as could possibly be asked. Its accuracy and fairness have never been questioned.

Multiplying the number of years by the respective annual wage for the three periods, the total earnings of Moser for an outside expectancy of 37 years would have been $81,800.00.

Plaintiff's counsel proved by defendants actuary that the present cash value of these same earnings figured at the low rate of four per cent would be $42,416.00, *that is to say that the present value of the same earnings through a period of thirty-seven years was just a little over fifty per cent of the total of those earnings.*

A more graphic illustration could not be had of the importance of the rule laid down in the Kelly case.

This $42,416.00 is the present value of Moser's total earnings on a 37 year expectancy basis—not the present value of his contributions.

Assuming—which is manifestly not the fact—that the verdict of the jury $34,000.00 represents the present value of the contributions Moser would have made to his wife and daughter, through the years, then there was left for him to spend on himself approximately only $8,000.00; i. e., to sustain this verdict as being based on reduction to present value, the violent presumption must be indulged that in the 37 years his wife and daughter would have gotten $34,000.00 of his earnings and only $8,000.00 would have been spent by him on himself. The assumption is not warranted; to the contrary the conclusion is inevitable that on the basis of the present value of all his earnings, that the contributions through the years as reflected by the verdict are not reduced to a present value.

The jury considered nothing but Moser's earnings. No other element of damage is mentioned by them, and the only other element of damages, the advice and counsel to the child, has no such support in the record as would justify an assessment of damages.

The amount of this verdict at eight per cent will yield $2,720.00 per year; at seven, $2,380.00; at six, $2,040.00; at five, $1,700.00; at four, $1,360.00.

The total earnings for 37 years, $81,800, would average $2,210 per year. One-half of this would be $1,105.00 and two-thirds of it would be $1,473.00.

Three of the jurors made their calculations on the basis of a $900.00 per year contribution by Moser, or one-half of an $1,800.00 income; two on the basis of $1,000.00 and one on the basis of $1,200.00. The other three did not seem to have any basis for calculation.

It will be noted from the above that the interest on this verdict at 8% is $510.00 more than the annual average of his entire actual earnings; and at 7% is $160.00 more, and at 6% is only a few hundred dollars less than his total earnings, but over $900.00 more than one-half of his earnings and about $600.00 more than two-thirds of his earnings. And at 5% the interest is approximately $600.00 more than one-half of his average earnings, and $226.00 more than two-thirds of his average earnings, and even at 4% interest is approximately $250.00 more than one-half of his average annual earnings and only about $100.00 less than two-thirds of his average earnings.

So it is manifest that at any rate above four per cent the plaintiffs will get more interest from this judgment—considerably more—than Moser could possibly have contributed to them, and that at 4% they will get approximately as much as he would probably have contributed to them; and as to the widow, during her entire life the principal is kept intact and is available to her for disposition, and as to the child, as to whom contributions are only to be considered until she is 21, the principal continues intact and she has the whole amount available when she reaches the age of 21, to be hers forever.

It should be borne in mind that these figures are made on the basis of a 37 year expectancy when Moser's real expectancy as a brakeman was only about 31 years; and in the calculations no allowance is made for sickness, loss of time, vacations and possible decline in earning capacity with approaching age.

In other words, the calculations are made on the very outside basis—a basis that really is not justified.

Again it is manifest that the verdict in this case on the face of the record could not have been reached by reduction to present values.

From thoroughly credible sources and without any ontradiction whatsoever, the defendant showed that noney could be safely loaned in Bell County and in ther sections of the State—with ample demand—at ight per cent, without risk and without cost to the ender, the broker furnishing for a commission paid y the borrower, the requisite skill and judgment. his testimony being undisputed, we insisted in the ourt below that we were entitled to have the eight er cent rate used.

But certainly in the light of the record considera- ion of a rate lower than six per cent was unwar- anted.

Under the testimony of Anderson, which is in no ay questioned, two-thirds of the annual earnings fig- red at eight per cent would have a present value of 17,446.00; at seven per cent, $19,439.00; and at six er cent, $21,845.00.

And we submit that this last figure, $21,845.00, gured at 6 per cent, marks the very maximum of idgment that this record will justify if the rule re- icing to present value is applied.

And taking Anderson's figures developed by plain- ff, the same earnings, reduced to present value at ur per cent have a present value of $42,416.00, and suming that plaintiffs would have received two- irds of the earnings, the present value of what they ould receive being one-third less, would be $28,- 1.00, even figured on the whole thirty-seven year riod.

And taking the cost of annuities as proved by plaintiff, or $18.36 for each dollar (testimony of Bassett, R. 93) and multiply this by $1473.00, two-thirds of Moser's average annual income under the table for the full thirty-seven years, gives a maximum verdict of $27,054.28 as against the $34,000.00 rendered.

So it is apparent from these figures that on the lowest bases suggested, the judgment is six to seven thousand dollars excessive, even though figured at an expectancy of thirty-seven years when thirty-one was the proper one, and without cutting it down to the period of minority or making any allowance for advancing age, sickness, etc.

At the rate of six per cent it is approximately $12,000.00, more than a reduction to present values will warrant, and at seven, about $15,000; and at eight, about $16,500.

Aside, therefore, from the testimony of the jury that no such rule was considered, the record makes it clear that the verdict was not reached by application of the rule of reduction to present value and that the verdict while guaranteeing plaintiffs every dollar of contribution that could be reasonably expected and more, will not, as required by the rule, *absorb itself*, but will *perpetuate itself* and will continue a fund that will yield the same annual rate for all time to come, being therefore, clearly in the condemnation of the Kelly case in that it affords more than compensation, being arrived at by aggregating the benefits without taking account the earning power of the money presently to be awarded.

In the cases of *L. & N. v. Trammel* (Ala.), 9 So. 870; *McAdory v. L. & N.* (Ala.), 10 So. 507; *Central Railroad v. Rouse* (Ga.), 3 S. E. 307; *A. & W. v. Newton* (Ga.), 11 S. E. 776, all cited by this Court in the Kelly case, and in the cases of *Chaffin v. N. & W.*, 93 S. E. 822; *Jones v. Kansas City Southern*, 78 So. 568; *Simmons v. L. R. & N. Co.*, 96 So. 12, citing and following the Kelly case, verdicts are analyzed under the records as we have undertaken to analyze the verdict in this case, and the verdicts condemned because of being manifestly more than present values.

In the very recent case of *Sipes v. Michigan Central* (Supreme Court of Michigan, decided June 15, 1925), 231 Mich. 404, 204 N. W. 84, the Supreme Court of Michigan says:

> "The amount awarded would yield an income, if placed at interest at 5 per cent, of $758.33 per annum, come within $3 of decedent's average yearly earnings, and at the end of 39 years the sum awarded would still be intact. In Chesapeake & Ohio R. Co. v. Gainey, 241 U. S. 495, 36 Sup. Ct. 633, 60 L. Ed. 1124, the widow had verdict for $16,000, and it was insisted that the award if placed at interest, would yield an annual income greater than the amount the widow would have received, and yet leave her the principal to dispose of at her death. It was held that such a result is not permissible."

2.

The testimony of the jurors absolutely confirms the clear deduction from the record that the rule of reduction to present value was in no way applied in this case.

The testimony of the jurors is set forth supra pp. 27-33.

They are an absolute unit on the proposition that they made no attempt to reduce to present value and had not the slightest idea under the charge that any such duty was required of them.

They are a practical unit also on the proposition that they arrived at their verdict by a very liberal aggregation—summing up—of the contributions that might be expected through the years and taking substantially that sum as their verdict without any reduction whatsoever for the earning power of the money.

We discuss below the insufficiencies of the court's charge to advise the jury of the requirement for reduction and the objections of the defendant to the charge.

But right here in connection with the testimony of the jury we ask the court's attention to the phraseology of Special Issue No. 7 and the language therein that we have italicized:

> "What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they re-

> spectively suffered by reason of his death, if any? *This question you will answer by stating the aggregate amount of such pecuniary loss or damage, and you will answer in the space below the amount you find from the evidence.*" (R. 22.)

What the Court here tells the jury to do their testimony shows most emphatically they did. They determined and stated "the aggregate amount of such pecuniary loss or damage"; but this without any attempt to reduce to present values.

The special issue is relatively short. The general nstruction on the measure of damages is relatively ong.

It was perfectly natural for the jury to make more eference to the special issue, it was a short and clear-ut statement of what they were to do. And by the se of the language "stating the aggregate amount f such pecuniary loss or damage," the trial court learly emphasized and made more positive the error s against defendant in not making his general in-truction more explicit and definite.

3.

Charge of the court was not full enough to convey the minds of the jury the important rule of the elly and Gainey cases—that the contributions to be pected through years must be reduced to a present lue by taking into consideration the earning value the sum presently to be awarded; the terse ex-ession "at this time" is not sufficient to insure the

conveyance of the rule; and defendant's exceptions to the charge should have been sustained and the charge made more full.

The Kentucky court in the Kelly case declined to apply the rule of reduction to present values because it regarded a jury incapable of determining a verdict under such a rule.

This Court points out the fallacy of this position and undertakes to make clear to trial courts the rules by which the determination of a verdict in cases of this kind must be had.

And pertinent to the question in hand the following principles are laid down:

> "It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future."
>
> That a verdict will afford more than compensation if it be made up by aggregating the benefits without taking into consideration the earning power of the money that is presently to be awarded.
>
> That a person seeking damages must use reasonable care to lessen the damage.
>
> That at this day the putting out of money at interest is so common a matter that ordinarily it cannot be excluded from consideration in determining the present equivalent of future payments, etc.
>
> That local conditions are not to be disregarded.
>
> That the principle of limiting the recovery to compensation requires that adequate allowance

> be made according to the circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only.
>
> "And in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award."

To convey all of these principles to the mind of a jury unlearned in the law and unfamiliar with such matters, and thought by the Kentucky Court not capable of considering them at all, it is held by the Texas Court of Appeals in this case that it is sufficent to use in the charge to the jury the brief open sesame "at this time"; that these three words "clearly encompassed (meaning, we take it, were in themselves sufficient to convey to the mind of the jury the obligations to find, etc.), present value of future expectations."

It is asking too much of this brief expression that it be the sole medium for the conveyance of so important a rule; and the rule was too vital to defendant for it to be left uncertain as to whether the jury would clearly understand it.

The full language of the charge quoted by the Court as being sufficient, when aided by the three words quoted, is as follows:

"At such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss," etc.

To a trained lawyer fresh from a reading of the Kelly and Gainey cases, the expression "at this time" *might* have been understood as an injunction to reduce to present values.

But that the words would convey the same idea to an unlearned jury who knew nothing of the Kelly or Gainey cases, is a very different matter.

This Court recognizes in the Kelly case that it may be difficult for the ordinary juryman to calculate interest on deferred payments with annual rests.

Relatively few people in the ordinary walks have occasion to make such calculations. The general run of jurors know nothing about the necessity for such calculations to say nothing of the methods.

When, therefore, a jury is told to assess such a sum "as would fairly compensate the surviving wife and child for the actual pecuniary loss" it would certainly not ordinarly occur to them that they were to reduce to present values.

And any sum they would arrive at they would naturally suppose would be paid now and if paid, of course, would be paid in cash.

And we submit that adding to the instruction the language "as if paid in cash at this time" really adds nothing to what would be conveyed to the minds of the jury, and that the instruction with these words in it no more conveyed to the minds of the jury the idea that they were obligated to reduce to present values than if the expression had been left out and the charge had read "at such sum of money as would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss."

It seems to us that the emphatic, controlling words of the charge with the average jury naturally and practically always sympathetic with the injured party, specially a widow and children, are, "such sum of money as * * * would be *sufficient to fairly compensate* the surviving wife and child," etc.

The testimony of the jury shows conclusively that this was the controlling language with them.

The majority of them figured out what they thought was the probable annual contribution and multiplied that by the expectancy to arrive at their verdict.

Not a single one of them attempted to reduce to present values or considered that they were under obligation so to do.

As the juror M. L. House puts it: "I just figured what it would take to support this woman and child, that is, if she had drawn from year to year out of the money that was given to her." Or, as the foreman puts it: "A sum that could be drawn out without regard to anything being put out at interest at all, which would make up what he would have been able to contribute to his family if he had lived." Or, as the juror Dubose puts it: "That it was Mrs. Moser's business after the money was paid to her to do as she pleased with it and I thought if she wanted to put it out at interest it was her business; the charge said to give her in a lump what was to keep her up and that child, that is the way I understood it."

While differently phrased, the testimony of all of the jurors is really relatively to the same effect.

So as a matter of fact, at least, *we know* that the jury did not understand from this charge that they were to reduce to present value.

Defendant made timely objetcion to the charge on the ground that the language used was not sufficient and that the charge "should tell the jury that they will assess the plaintiff's damage at the present value of the contributions in money * * * ."

"To fix the damages at the present cash value of the contributions in money" is the expression of the charge asked in the Kelly case, and is certainly a very much clearer and more definite instruction than simply to refer to a payment "at this time."

But we asked further that the Court should explain to the jury how such present value may be determined under the evidence.

The defendant had laid before the jury in line with the suggestion of this Court in the Kelly case, accurate and well worked out data by which the present value could be determined.

This testimony was a thing of value to the defendant under a full charge by which the jury would have been advised as to their obligation with reference thereto.

But the practical ignoring of this line of proof and the absence of any instruction directly bearing upon it was calculated to entirely nullify its effect before the jury—as the testimony of the jury shows that it did; and the presence of the testimony therefore, did not aid the charge.

The charge is further objected to on the ground that it did not give the jury a rule or formula by which it might determine the amount of money if paid now that would fairly and reasonably compensate, etc.

Under Texas practice where timely objection is made to a charge and the defect in it pointed out, it is not necessary for the saving of the error that special instructions should also be asked.

G. C. & S. F. Ry. Co. v. Conley, 113 Tex. 473.
G. C. & S. F. Ry. Co. v. Locker, 273 S. W. 831.

4.

"In all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award." (C. & O. v. Kelly); and, as we submit, is to be discounted at such safe rate.

We have quoted the language of this Court in the Kelly case in the heading above.

Defendant showed by an abundance of testimony that money could be safely earned in Bell County and all over Texas, without cost or risk to the lender at 8 per cent.

The plaintiff made no attempt to contradict this testimony and it stands uncontradicted in the record, and under the well-settled rule that where testimony is undisputed the facts are to be taken as shown (*Grand Fraternity v. Melton*, 102 Texas at page 402; *Hines v. Pennington*, 240 S. W. at page 704; *Hall v. Ripple*, 145 S. W. at page 311), defendant felt that it was entitled to have the reduction figured on an 8% basis, and it asked a special charge to that effect which was refused.

We believe that charge was warranted under this record.

But whatever objection might be made to it, defendant was certainly entitled to have its Special Charge No. 8 (supra, p. 23) given.

It directed the jury "to make their calculations on the basis of their award bearing interest at the highest net rate of interest that the testimony shows can be had on the money safely invested and secured, as shown by the testimony in this case."

This instruction is based directly on the quotation made above from the opinion in the Kelly case.

It did not undertake to say what the rate should be. It did, however, require the jury to find a *safe rate* and to make a reduction *on the basis of that rate.*

And a safe rate being found by them there was certainly no discretion in the jury to figure out a lower rate, two, three, four, five, etc., per cent as they willed.

As applied to a court, discretion means "sound discretion guided by law and must be governed by rule, not by humor. It must not be arbitrary, vague and fanciful" (Lord Mansfield, 4 Burrows 2539); it is to be exercised in determining the course prescribed by law; and, when it is discerned, it is the duty of the court to follow it (*Osborne v. Bank*, 9 Wheat 737), and certainly an unlearned jury has not a wider discretion.

In *Seaboard Air Line v. Tilghman*, 237 U. S. 499, 59 L. Ed. 1069, where the question was as to a proper charge on the question of reduction of damages because of contributory negligence, this Court says:

> "No reference was made to the rule of proportion specified in the statute, or to the occasion for contrasting the negligence of the employee with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable."

We submit there is no distinction in principle between a charge on the effect of contributory negligence and a charge to reduce to present values. The defendant was just as much entitled to have a standard defined by the charge in the one instance as in the other. And we submit that the charge of the court and his refusal to give our special charge is open to the condemnation of the charge in the Tilghman case.

5.

The value of the services of the wife to the husband and the child to the parent of which they were respectively relieved by the death are proper matters to be considered by the jury in reduction of the damages.

Had it been the wife who was killed instead of the husband, he would have been entitled to recover the reasonable value of the services she would have rendered him; and if it had been the child who had been killed he would have been entitled to have recovered the value of her services to him.

Very large verdicts have been rendered for these elements of damage and have been sustained.

Services cannot be rendered without a draft on the time and energy of the parties rendering. The measure of damages under the death statutes has never been considered on a sentimental basis. The question involved is only a practical determination of pecuniary values.

If the services of the wife have a value to the husband if lost to him, they certainly have a value to her if saved to her.

The particular question here raised has not been passed on by the courts that we have found, but cases involving the same principle have been ruled favorably to our contention.

It is well settled that in a suit by the husband for the death of the wife that the measure of damages would be the pecuniary value of the wife's services *less the cost of properly and suitably maintaining her. G. C. & S. F. v. Southwick*, 30 S. W. 593; *Gorton v. Harmon*, 152 Michigan 472, 116 N. W. 443; Corpus Juris, Vol. 17, title "Death", Section 233.

In the *Southwick* case in the opinion it is said:

> "The court was requested to instruct the jury that in estimating the damages, if any, sustained by the plaintiff J. S. Southwick in the death of his wife, they should consider the expense of maintaining the wife, and the measure of damages would be the pecuniary value of the wife's services, less the cost of properly and suitably maintaining her. * * * The charge requested and refused should have been given, as it gave the proper rule for determining what the loss of the husband, if any, was."

In the *Harmon* case, 152 Michigan, the Supreme ourt of Michigan, 116 N. W. at page 445, says:

> "The court instructed the jury that the measure of damages was the value of the services lost to the plaintiff, and that they should not deduct the cost of her maintenance. It is the well-settled rule under this and similar statutes that compensation is limited to the pecuniary loss sustained. * * * Counsel for plaintiff cite several cases and text-book authorities holding that a husband is entitled to recover the reasonable value of the time and services lost to him, but none of them discuss the question now before us. It is as much the duty of the husband to provide suitable clothing and maintenance for his wife as it is for his son. He is entitled to the value of the services of both. It is the universal rule that

> in case of a son or daughter the cost of maintenance must be deducted from the value of his services. Snider v. Lake Shore, etc., Ry. Co., 131 Mich. 418, 91 N. W. 643; McDonald v. Champion Iron & Steel Co., 140 Mich. 401, 103 N. W. 829. There can be no distinction between the case of a son and that of a wife. The pecuniary loss in each case is the value of the services less the cost of maintenance. See Gulf, etc., R. Co. v. Southwick (Tex. Civ. App.), 30 S. W. 592; Railway Co. v. Gunning, 33 Colo. 280, 80 Pac. 727; 13 Cyc. 370. It follows that the instruction of the court in this regard was erroneous."

The reason the cost of maintenance should be deducted is of course because *more than compensation* would be awarded if the full value of the services of the wife or child were allowed without such deduction.

The Court of Appeals disposes of our contention in this connection by saying:

> "Under appellant's proposition, if Mrs. Moser had herself been earning an income, and would probably have contributed services to him equal in value to his probable and expected services to her, she would have been entitled to recover nothing for his death. Or, as a reductio ad absurdum, if, as might be true in some instances, the pecuniary value of the services to be rendered the husband by the wife, should exceed the pecuniary value of the services to be rendered the wife by the husband, and the Railway Company should negligently kill the husband, under appellant's theory she would be indebted to the Company for his death."

We see nothing extreme or absurd about the result ached by the application of the rule contended for us even as stated by the Court of Appeals; with e exception, of course, of the suggestion that the usband or wife might become indebted to the Rail- ay Company—this feature needs no answer.

If a wife's earnings are greater than her husband's nd if there be any contribution from one to the other, is by the wife to the husband and not the husband the wife, certainly she sustains no pecuniary ss by his death and an award of damages to her uld only be by way of solatium, which is not per- issible.

It is certainly the law in these cases that if there not in fact a pecuniary loss, there can be no re- very.

And that the wife's contribution may be in service stead of money makes no difference. If they run a ore together and she does all the work and he takes t all the profit, she is certainly not a loser by his ath.

That the services she may render are household rvices makes no difference in principle. The differ- ce, if any, is in degree and not in kind. That the aft on her time and energy if she still performs the usehold services for her child may not be greatly duced does not affect the principle. How much the duction should be, is for the jury under all the facts d circumstances.

If the position of the Texas Court of Appeals is correct, then the holdings in the Southwick and Gorton v. Harmon cases, supra, are wrong, because the cost of a wife's maintenance—as is unfortunately too often the case—may exceed the value of such services as she renders and therefore if the rule of the Texas Court was followed, the husband could recover nevertheless.

As pecuniary compensation is all that is to be awarded under the death statutes, a defendant is certainly entitled to have the jury consider in mitigation of damages the value of any benefit or relief that comes to the beneficiaries by reason of the death.

6.

The jury should have been instructed to take into consideration the probability of Mrs. Moser's marrying again.

Mrs. Moser was just 27 (R. p. 79).

So far as we have found, this question is an open one in the Federal Courts.

In the case of *Sipes v. Michigan Central*, 231 Mich. 404; 204 N. W. 84, decided in June, 1925, the Supreme Court of Michigan says:

> "The widow was 21 years of age at the time of the trial, and defendant requested the court to instruct the jury to consider, in fixing the period of loss of support, the possibility of her remarriage. This was covered by the tenth request, and was not given, nor the substance thereof included in the charge. The possibility

> of so young a person contracting another marriage should have been permitted to temper the thought of celibacy for 39 years. Jones v. McMilian, 129 Mich. 86, 88 N. W. 206."

In the case of *Dinnihan v. Beach Imp. Co.*, 40 N. Y. Supp. 764, the suit was for the death of a 16 year old girl whose father was a laboring man, his wife being dead and the daughter keeping house for him, the action being brought for the sole benefit of the father, and in the case Judge Follett, discussing the amount of the verdict and reaching the conclusion that same is excessive, says:

> "The fact that she might have married, or died, and left her father's service on becoming of age, are possibilities which should be taken into account in determining his pecuniary loss."

In the case of *Collins v. City of St. John*, Supreme Court of New Brunswick, 38 New Brunswick 86, at page 95 it seems to be clearly recognized that the probability of parties marrying again under these circumstances is one properly to be considered. Discussing the question of amount of damages the Court says:

> "Of course it may be said that the plaintiff, without any family, need not and in fact does not keep house, or that six years is an unreasonably long period to fix as the life of one so seriously affected by heart trouble, or it may be said that a much more likely thing will happen that the plaintiff will remarry and his domestic *status quo* be restored, and, therefore, $900 is too large

> a sum. The jury is, however, the judge of these things, and we must assume that these considerations were present to their minds when they fixed upon $900 as the damage."

We are well aware that perhaps the weight of authority is against our position, but we earnestly submit that the weight of reason is for it.

The law undertakes only to compensate and the probability of parties who have lost a spouse remarrying is always present—always very possible—and that the view expressed by the Michigan, New York and New Brunswick courts is, we submit, the sound position.

7.

There being nothing to show that deceased had any qualifications that would render any advice or training by him a matter of pecuniary value; or of such character as could only be supplied by another for compensation; or that any training, advice or nurture he might furnish had any pecuniary value, such elements should not have been submitted to the jury, but they should have been instructed to disregard the same.

In *Michigan Central v. Vreeland*, 227 U. S. 59, this Court says:

> "A minor child sustains a loss from the death of a parent, and particularly of a mother, altogether different from that of a wife or husband from the death of the spouse. The loss

> of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral, and physical training, such as, when obtained from others, must be for financial compensation.
>
> "In such a case it has been held that the deprivation is such as to admit of definite valuation, *if there be evidence of the fitness of the parent*, and that the child has been actually deprived of such advantages."

And recognizing that a surviving wife might be entitled under certain conditions to compensation for services that the husband might be in the habit of rendering to her, this Court says:

> "But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such 'care and advice from their own experiences as men.' These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband."

The charge in this case does not tell the jury in express words that they may estimate the financial value of such "care and advice from their own experiences as men," but the effect is the same because there was no evidence of the character of care or advice the deceased was capable of or would have rendered, and of necessity they must, to have considered the issue at all, have done so from the standpoint of their experiences as men.

And in *American Railway Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456:

> "There was no allegation for any such loss, nor any evidence relating to the subject, or from which its pecuniary value might have been estimated. The scope of the compensation recoverable under this statute has been so fully considered in Michigan C. R. Co. v. Vreeland, decided January 20, 1913 (227 U. S. 59, ante, 417, 33 Sup. Ct. Rep. 192), that we need not say more."

In *Griffey v. Pacific Electric Company*, 209 Pacific 50, the Supreme Court of California considers at length the question of whether a father may, in an action for the death of his grown daughter, recover on account of loss of society and comfort and specially as those terms might involve the loss of advice and counsel, etc., and concludes that those elements could not be considered without proof of the daughter's *special qualification to render service in that connection and its value.*

And in *Sipes v. Michigan Central*, decided June 15, 1925, 204 N. W. 84, the Supreme Court of Michigan, while recognizing that the pecuniary loss of an infant might include the expense of supplying such degree of nurture and moral and physical training "*as the* *evidence shows such parent was, by reason of ability, character and temperament, capable of giving,"* says:

> "Mere parentage does not carry such a showing.
>
> "Evidence relating to the nurture bestowed, and revealing the intellectual powers and moral character of the person, is available, and must be introduced to show the extent of what would have been supplied by the deceased had he lived, and, by reason of his death, need now be bought and paid for.
>
> "To measure what has been lost, it is necessary to consider the capacity of the parent to bestow. Without such light, the jury would *have to apply their own standards, based on their individual experiences and these would, of necessity, 'be as various as their tastes, habits and opinions.'* See Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C 176."
>
> "And the result would therefore be reached without considering the parent at all.
>
> "The evidence falls short on this subject and there was error in permitting the jury to assess damages for such a loss."

The evidence here clearly falls short of any showing by which the jury could measure what had been lost and any award they would make must rest solely upon mere parentage.

Proof such as was made in this case could be made in nearly any case. Nearly all men in this country of about Moser's age have been through high school and the great majority of American fathers, specially those of the middle class, are devoted to their children and like to be with them, specially their first born and when they are small.

Paraphrasing the Supreme Court of Michigan, if the jury can allow damages for nurture and advice under the evidence in this case, they are warranted in doing so in any case. The individual parent is not involved at all, for all that the evidence shows is that he has the common attributes of all fathers; love and affection for his child and a common school education. The love and affection will be lost to his child, but these are not recoverable for.

That he was capable of giving advice of value is not shown at all.

This reasoning applies specially to the loss by a minor daughter of her father.

As a rule, mothers rear children, not fathers, and this is specially true with reference to the girls in a family.

And we submit that it is a far call to permit the average jury to take as the basis for the swelling of damages in death cases the vague, general question of the possible, speculative value of advice and training that men in the ordinary avocations of life and with no special aptitude to give advice or to train might give a minor daughter.

8.

Such matters not being covered by the charge of the court, defendant was entitled to have given its

special charges directing consideration in connection with the question of damages, of the probable effect on deceased's earnings of a return to normal conditions after the abnormal conditions of the war and of the effect of advancing age, possible sickness, etc., and the hazardous nature of his employment, etc., and the probable effect of these matters on his earning capacity.

The undisputed testimony was in keeping with common knowledge, to-wit: that wages went to absolutely abnormal limits during the war. There had been one decrease before Moser's death from this abnormal wage rate. That further reduction would come with the return to more normal conditions was among the probabilities and defendant was entitled to have the jury consider such probable reduction of wages as might be expected to follow.

In *Burns v. Railroad*, 68 Atl. 704, the Court condemned an instruction by the trial court because of its "disregarding the important fact that his earning powers were necessarily diminished as he advanced in years."

In *Glasgo v. Green* (Pa.), 117 Atl. 79, it is said:

> "Furthermore, earning capacity extending over a long term of years should be considered as in average rather than war times (Burns v. Pennsylvania R. R. Co., supra), and the decreasing capacity, with advancing years, should also be considered."

It is the testimony of the actuary Anderson and is a matter of common knowledge that the calling of deceased, that is railroad brakeman, was extra hazardous. The very hazard of the calling is one of the elements that have made for the high rate of wages paid. It is incident to the nature of the calling and not necessarily traceable to negligence. The calling made a difference of over five years in the expectancy as figured by the Insurance Companies.

In *Jones v. Kansas City Southern Railway*, 78 Southern at page 571, the Supreme Court of Louisiana says:

> "The evidence shows that the life expectancy of a locomotive engineer, because of his hazardous occupation, is taken 8 years beyond his age. Accordingly a locomotive engineer 56 years of age is rated at 64. That rule has been adopted by the life insurance experts, and there is no reason why we should not avail ourselves of their knowledge and experience. In fact, we have this strong equitable reason for considering the danger of the occupation: That it is presumed that the employe was compensated for the risk, in the wages he received, and that the beneficiaries will therefore have the compensating advantage of a higher rate of future benefits, in our calculation, than they would have if the risk had been an ordinary one."

In the case of *Simmons v. L. R. & N. Co.*, 96 Southern 12, it is stated that the trial court in computing damages in an action under the Federal Employer's Liability Act, deceased being employed as the foreman of a construction gang, applied the formula given in the Jones case (supra), which formula was one for reducing annual contributions to a present value, "except that he declined to make allowance for the hazardous occupation of deceased in figuring on his life expectancy." In this conclusion the Supreme Court of Louisiana refused to concur and adverting to the rating that insurance companies give to the hazardous occupation says:

> "The reason why the insurance companies charge a higher rate on the life of a man of hazardous occupation than on the life of a man of nonhazardous occupation, of the same age, is that the man of hazardous occupation has a greater chance of being killed, and has the same chance that any other man has of suffering any other of the ills that flesh is heir to. In other words, according to the theory of chances, a larger proportion of men of hazardous occupations than men of nonhazardous occupations, of the same age, die every year."

And the court concludes that the hazardous character of the occupation should have been considered.

Certainly the defendant was entitled to have the jury instructed as to every rule applicable to the facts for the reduction of damages which a court is required to enforce.

In the early Georgia case of *Central Railroad v. Rouse*, 3 S. E. 307, Chief Justice Bleckley stated the rule for the measure of damages in a death case as follows:

> "The measure of damages, in an action by a wife for the homicide of her husband, since the passage of the act of 1878 (Code, 2971), is not affected by the wants of the family, but depends solely on the value of the husband's life. In estimating such value by age, habits, health, occupation, expectation of life, ability to labor, and to furnish care and attention to the family, probable increase or diminution of that ability, with lapse of time, rate of wages, etc., the necessary personal expenses of the husband should be deducted, and the balance, reduced to its present value, would be the value of the life."

This comprehensive statement of the rule is in line with practically all of the authorities and it is certainly in line with the decisions of this court.

And as the age, health, occupation (which necessarily involves its nature and character and the dangers incident thereto), ability to labor and "probable increase or diminution of that ability, with lapse of time," are proper matters to be considered, certainly the defendant is entitled to have the jury instructed in regard thereto.

The judgment of the Court of Civil Appeals should be reversed and the cause remanded.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 192~~6~~7.

No. 53

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,
vs.
MRS. OLENA MOSER, ADMINISTRATRIX, *Respondent*.

On Certiorari to the Court of Civil Appeals of Texas,
Third Supreme Judicial District.

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT

LAWRENCE H. CAKE,
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CHAS. K. LEE,
Attorneys for Petitioner.

[illegible]

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(1)

AS TO STATEMENTS FROM THE RECORD BY RESPONDENT

(Their Brief, pp. 3 to 10)

While we do not feel the statements by respondent have added anything material to the statement as we have set it forth in our brief, to prevent any misapprehension on the part of the court as to what the record shows, we will briefly comment on some features of the statements as made.

They say (Br. p. 3) that "during the five years preceding his death, not taking into account the time he was absent in the World War, he had earned an average of more than $2000.00 a year."

To reach this average there must be included the extraordinarily high wages for a short period after the war from May, 1920, to July, 1921, when the railroad wages went to the peak of war prices, stated by the witness Dickson as being, so far as he knew, the highest rates ever paid railroad men in this country (R. 115), and as a matter of common knowledge, we think is the highest that were ever paid. These wages were absolutely abnormal and fell materially in July, 1921, and continued at the lower rate until the date of Moser's death, approximately twenty-one months later. Manifestly this last period is the only just and fair one to take as establishing Moser's earning capacity at the time of his death; and it is the one defendant took.

It is also manifest from the testimony of the jury that this was the figure they took—practically all of them.

But even if this average were warranted, it would not disturb the clear deduction under the record that the verdict cannot be sustained under the rules of the Kelly case.

Respondent further says that under the mortality tables Moser had an expectancy of 36.73 years. This was not Moser's expectancy—that is, not the expectancy of one engaged in the hazardous occupation of brakeman as to which calling the expectancy was 31.7 years (Our Br. p. 7, R. 122).

As to the probability of promotion, we have set forth all the testimony bearing on this question in substance, being the testimony of plaintiff's witness Grazier (our Br. pp. 7 to 10)—practically all the testimony there is on the matter in the record, and pages 10 and 11 have shown how the table submitted to the actuary was made up on the basis of possible promotion, and as we have stated in our brief, the fairness of the basic data as submitted to the actuary has at no time been challenged by the other side.

As to interest rates, pertinent to the extracts quoted by respondent (her brief pp. 4-5) the witness Harrison further testified that in placing money for people he gave them the benefit of his judgment and experience in placing the loans, "that is what I sell them, but it is paid for by the borrower; I give them the benefit of my experience in protecting them, and that is without cost to them and they get eight per cent for their money" (R. 81), and he testified to having placed about $2,000,000.00 in fifteen years with only one foreclosure and no loss (R. 80); further that there was more money loaned at higher rates than at the 3½ to 4½ per cent rates, and asked by respondent's counsel if he did not know that on any large loan on real estate "that you can get all the money you want at 6%?" he answered, "I do not know about that. On choice business property money is had at 6%" (R. 80).

The witness Temple did not testify he paid taxes at $3.50 on a valuation of $100.00. He said he rendered his notes for taxes and paid the taxes but did not know the city and county tax rate but thought it was approximately $3.50 (R. 97). As a practical matter, this is quite a different thing from saying that he rendered his notes and all of them at the full face value.

It was the testimony of W. W. Thomas, who had had about forty years experience and had been chairman of the Tax Appraisement Board for several years in Houston, Texas, that vendor lien notes and like securities were not rendered for taxation and were not taxed; "maybe one per cent of them are; I dare say it would not reach that" (R. 119). And the witness Maverick testified practically to the same effect as to San Antonio, Texas, and there is no testimony to the contrary except what the witness Temple said as to his own taxes. (R. 120.)

The witness Cloud further testified immediately following what is quoted by respondent: "I furnish that experience to the people who trust their money to me to loan. I pass on securities for some of them; they can get that experience from prominent brokers without expense to them; perfectly responsible men who are in business all the time, and the borrower pays the fees for the broker's trouble and expenses." (R. 118.)

And on examination by respondent's counsel he testified: "I don't know that men of great capital and means who have opportunity to invest their capital in this country prefer to put it out at three and a half or four per cent instead of loans on town property." (R. 118.)

As to extracts made by respondent from the testimony of the jury (their Br. pp. 5 to 10), nothing in these extracts in any way militates against the clear showing made by the extracts in our brief (pp. 27-33) and the absolute showing made thereby that the jury did not attempt in any way to reduce the contributions to be expected through the years to a present value and did not understand the court to so charge, but so far as the extracts bear on this particular question they sustain our position.

(2)

L. & N. v. Holloway, 246 U. S. 525.

This case, extensively quoted from in respondent's brief at pages 18 to 22, is not in point here.

The special charge asked there arbitrarily told the jury that in reducing to present value that they must figure interest at 6%; and that they must be controlled as to how long the deceased would have lived by the figures of one expectancy table.

As we understand, it has been uniformly held that while admissible to be considered by the jury, expectancy tables are not conclusive; this for the manifest reason that they are an average and many men fall short of their expectancy and many men exceed it.

Our special charge put no such limitation on the jury. Indeed, it said nothing about the expectancy at all.

So far as determining for the jury a definite interest rate, this Court holds in the Kelly case that the court cannot undertake to do this; and the special charge we urged does not attempt to establish any fixed rate.

But we submit this Court does lay down in the Kelly case a definite rule by which the rate of interest to be used shall be determined.

In the language of the opinion, a part of the opinion that respondent does not quote at all, although quoting very extensively from the Kelly case (their Br. pp. 15 to 18) as follows:

> "But, as a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award."

There is no controversy in this case that "it is reasonable to suppose that interest" could "safely be earned upon the amount" to be awarded. Respondent does not make any question as to this but only makes a question as to what that rate should be.

And the standard for the determination of the rate as indicated by this Court—and we submit the only intelligent standard that can be fixed—is that it must be one that can be had on the money safely invested and secured.

As we understand the Kelly case it lays down this rule as fundamental—the rate must be safe—to use an unsafe rate would be to jeopardize the principal and would not be fair to the party seeking a recovery.

And defendant's special charge No. 8 (our Br. p. 23) expressly leaves it to the jury to determine the rate; but it must be a (see charge our Br. p. 23) rate of interest that the testimony shows can be had n money *safely invested and secured*, as shown by he testimony in this case."

Safe investment and security was the limitation hich the plaintiffs were entitled to have on the rate o be fixed.

But a safe and secure investment being determined, r a rate at which a safe and secure investment could e had, the defendant was entitled to have that rate aken. The extent of the plaintiff's right to limit had een reached.

And the jury is not only required to find a safe rate ut this rate must also be *net* (R. 10) i. e., with all incidental expenses necessary to securing the investment at the safe rate which the lender would incur, taken off before fixing the rate.

The rate being determined on these bases, we submit that as a matter of law it became and should be taken as *the* rate to be used; the end of the discretion on the part of the jury has been reached.

Paraphrasing the language of Chief Justice Marshall in the Osborn case (substituting jury for court), 9 Wheat. 738:

> "Juries are the mere instruments of the law and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law, and when that is discerned it is the duty of the jury to follow it,"

and the jury having determined the safe rate, there was no discretion to use any other.

And the defendant was as clearly entitled to have the jury take the highest net rate as the plaintiff was entitled to have them determine a rate that was safe and net.

To illustrate: The Railroad Company contended in this case and we think established by uncontradicted testimony that money could be safely invested at a net rate of eight per cent.

It is contended by the other side that the rates down as low as four per cent are the safe rates. The witness Harrison—a man of wide experience—indicated that six per cent was a practical minimum for even large loans in Texas. The full limit of the jury's discretion was to determine which one of these rates was *the* safe rate. And if the jury found that eight per cent was safe (which was the maximum discussed under the testimony), then defendant was entitled to have that rate used. If they had any question as to eight per cent, but found that six was safe—it was the next rate discussed—then that became established as the rate, that is, it was the highest safe rate. And there was certainly no discretion in the jury to pass below the highest safe rate and use another and lower safe rate and thereby swell the verdict. If the defendant was not entitled to this limitation then the jury could have used any rate below the highest safe rate that they saw fit and the case would be determined by the arbitrary will of the jury and not by the legal rules given them under the charge.

The special charge we asked took no question of fact properly for the determination of the jury from them, but left it to them to determine the safe rate, only requiring them to use it when determined.

The only other assignment which this court considered in the Holloway case was one complaining that the damages were excessive, this Court holding that a question of excessiveness of the verdict is not reviewable here, citing *Southern Railway, etc., v. Bennett*, 233 U. S. 80, but this Court continues: "It does not appear in the case at bar as it did in Chesapeake & O. R. Co. v. Gainey, 241 U. S. 494, that the action of the Court of Civil Appeals in sustaining the verdict was necessarily based upon an erroneous theory of Federal law." (See Respondent's brief p. 22.)

While the excessiveness of the verdict was complained of in the Texas Courts by petitioner here, and it is our view that the verdict is manifestly excessive, the question of excessiveness purely, because of the rulings of this Court in the Holloway and Bennett cases is not urged here.

The question we do present to the Court is that an analysis of the record makes it absolutely clear that the rule of C. & O. v. Kelly has not been applied in this case and "that the award is clearly a violation thereof and grossly in excess of what would be a proper award under the rule." (See third specification of error, our brief pp. 34-35 and Subdivision (b) page 3.)

In *C. & O. v. Gainey*, 241 U. S. 494, this Court says:

> "On appeal to the Kentucky Court of Appeals it was insisted that this amount was grossly excessive, and was the result of erroneous instructions to the jury. It was contended that the ver-

> dict of $16,000.00 if placed at interest would yield an annual income greater than the amount the widow would have received had she lived, and would yet leave her the principal to dispose of at the time of her death. The court overruled this contention on the authority of Chesapeake & O. R. Co. v. Kelly, 160 Ky. 296, 169 S. W. 736, where the same court held that in such a case the whole loss is sustained at the time of intestate's death, and is to be included in the verdict without rebate or discount. A reading of the opinion of the court of appeals in the present case (162 Ky. 427, 172 S. W. 918) makes it evident that it was only upon this theory that the court was able to reach a conclusion sustaining the verdict.
>
> "Since we have held in Chesapeake & O. R. Co. v. Kelly, this day decided (241 U. S. 485, ante 1117, 36 Sup. Ct. Rep. 630) that the theory is erroneous, it results that the judgment here under review must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

We analyze the testimony (our Br. pp. 39 to 45) and undertake to show from the record that the verdict is arrived at on the basis of adding together—aggregating—the probable annual contributions without any attempt to reduce to present values; and we think bring ourselves clearly within the ruling of the Gainey case, and respondent does not undertake to meet what we say, but confines himself to brief discussion of the question of excessiveness (Res. Br. 23-24), which is not the question before the Court.

(3)

Respondent (Br. p. 18) says:

> "Even if the charge of the Court had been insuffcient to instruct the jury specifically to reduce future expectations of pecuniary benefits to present values, petitioner cannot complain unless it had requested a supplemental instruction correctly presenting the same."

This was not the rule under Texas practice at the time this case was tried, and is not now. Objections being made at the proper time and place as required by the Texas statute to a charge submitting an issue, it is not necessary in order to save the error, to ask a special charge correcting the insufficiency.

This has been clearly and expressly held by the Supreme Court of Texas in the case of:

> *G. C. & S. F. Ry. Co. v. Conley*, 113 Texas 472,

decided in March, 1924, in which case at pages 474 to 475 the Court, by the Chief Justice, says:

> "The case was tried on a general charge in which the jury was instructed, in part, as follows: 'A carrier of passengers is required to exercise the greatest degree of care which can be exercised under all the circumstances short of a warranty of its passengers.' The plaintiff in error, before the charge was read to the jury, objected thereto 'because the same does not state a correct rule of law and is more burdensome upon and imposes a greater duty upon a carrier of passengers than is required by law, and the defendant therefore says that the jury may be misled

thereby to defendant's injury.' These objections were in substance repeated to those paragraphs of the charge wherein the definition quoted above was applied to the facts of the case.

"The Court of Civil Appeals concluded that the charge complained of was not affirmatively erroneous, 'and therefore not reversible error in the absence of a requested instruction by appellant more fully explaining the degree of care required by appellant as a carrier of passengers.' *This was once the rule with reference to charges, not affirmatively erroneous.* Due, however, to statutory enactments, it is no longer so.

"Revised Statutes, Art. 1971, in so far as material here, reads as follows: 'The charge shall be in writing and signed by the judge; after the evidence has been concluded the charge shall be submitted to the respective parties or their attorneys for inspection and a reasonable time given them in which to examine it and present objections thereto, which objections shall in every instance be presented to the court before the charge is read to the jury, and all objections not so made and presented shall be considered as waived.'

"The Article further makes it the duty of the trial court to decide on and instruct the jury as to the law arising on the facts, and to submit all controverted questions of fact to the decision of the jury.

"Article 1985, relating to the submission of cases on special issues, requires the court to submit all the issues made by the pleadings, and provides that the failure to submit any issues shall not be deemed a ground for a reversal of the judgment unless its submission was requested in writing by the complaining party.

> "These two statutes were enacted to accomplish the same purpose, and we think a failure to submit any particular issue under either statute can be reviewed on appeal only where the record shows a special charge was tendered on that issue.
>
> "*But in the instance of a defective or erroneous charge on a subject or issue which the court has undertaken to charge upon, the objections required by Article 1971, take the place of special charges, and render it unnecessary that the latter be tendered.* It is immaterial whether the matter objected to in the court's charge is a *mere defective or incomplete statement of the law or issue to be determined, or is affirmatively erroneous; objections which sufficiently specify the error will preserve the point on appeal, without the necessity of again directing the court's attention to the same subject by special charge.*" (Italics are ours.)

The statutory provisions considered by the Supreme Court were the statutes prevailing at the time this case was tried in December, 1923 (R. 27); and it may be said in passing though not material to the case, that in the revision of the State statutes that has been had since the trial the provisions quoted by the Supreme Court have been continued in effect.

The Railroad Company in the trial court objected to the charge on the measure of damages and the special issues submitting the same, the objections specially directing the attention of the trial court to the failure to fully and properly instruct the jury as to their obligations to reduce to present values pointing out that the charge as given did not properly do so, and the overruling of these objections are assigned as error. (Our Br. pp. 21 to 22 and 33 to 34.)

So clearly under the G. C. & S. F. v. Conley case, even if no special charge had been asked on the question of damages, the question as to the failure to properly and fully instruct the jury to reduce to present values and the consequent deprivation of a right under a Federal statute—are clearly raised.

And this case in the Court of Civil Appeals, so far as the assignments objecting to the Court's charge are concerned, did not go off on any question of failure to ask a special charge correcting the error. The assignments objecting to the court's charge are disposed of on their merits as follows:

> "Appellant lodges numerous objections to that portion of the Court's charge for the jury's guidance in assessing the amount of damages. We have read carefully the charge and find that it lays down the correct rule as approved by the United States Supreme Court and the courts of this state. C. & O. Ry. v. Kelly, 241 U. S. 485, 60 L. Ed. 1117; I. & G. N. v. McVey, 99 Tex. 28. Appellant labors at great length to show that the trial court did not instruct the jury to reduce future contributions as appellees had a right to expect from the deceased, had he lived, to a present value. We find no merit in this. The language of the charge was that they should fix same 'at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss, etc.' The language '*At this*

> *time*' clearly encompassed present value of future expectations." (R. 128.)

So far as the special charges refused are concerned and the assignments complaining of such refusal, they were passed upon by the Court separately and without any reference to the assignments complaining of the overruling of the objections to the charge (R. 129-130).

So here as in *C. & O. v. DeAtley*, 241 U. S. 310, 60 L. Ed. 1016, the State appellate court having passed upon the questions of law involved under the assignments and assumed to decide them, in that connection denying to petitioner the rights under the Federal law it claimed in the assignments, the questions are before this Court as questions of law, and to paraphrase the language of this Court in the DeAtley case, "since the court of appeals assumed to decide them, it is incumbent upon us (this Court) to review the decision."

The Court of Civil Appeals having passed upon the assignments and the questions raised, there is no question of trial court practice and the proper way to raise the questions, involved.

In *North Carolina v. Zachary*, 232 U. S. 248, this Court says:

> "And since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this court render it clear that it is

> our duty to pass upon the merits of the Federal question."

And in *Montana v. Haire, et al*, 204 U. S. 291, this Court says:

> "Where it clearly and unmistakably appears from the opinion of the state court under review that a federal question was assumed by the highest court of the state to be in issue, was actually decided against the Federal claim, and the decision on the question was essential to the judgment rendered, it is sufficient to give this court authority to re-examine that question on writ of error."

To the same general effect are: *Miedreich v. Lauenstein*, 232 U. S. 236, 58 L. Ed. 584; *Chambers v. B. & O. Ry. Co.*, 207 U. S. 142, 52 L. Ed. 143; *Home v. New York City*, 187 U. S. 155, 47 L. Ed. 117.

(4)

At pages 25 to 27 of their Brief, respondent's counsel asks that the fact—shown by the undisputed testimony of the jury—that no attempt was made to reduce to present values, be disregarded, and in that connection refers to the decision in Caylat v. Railway Company, 113 Tex. 131.

All that was decided in the Caylat case is that it may be shown by affidavits of jurors that there was an error in writing up the verdict that had been determined so as to make it speak just the opposite of what was intended, and that when this was shown by the unanimous voice of the jury, a new trial should be granted.

There the unanimous voice of the jury was established before the court by the use of affidavits which the court says were "in practically the same language" (113 Texas 135) showing evidently that they had been given form by the attorneys in the case.

In this case the unanimous voice of the jury is shown by the examination and cross-examination of the jurors themselves in open court—a very much more reliable way to make the showing.

This was done under the provisions of a special act of the Texas Legislature which is quoted in the Caylat case as follows:

> "In 1905 the legislature passed a statute which has since been embodied in the Codification of 1911 as Art. 2021, reading as follows:
>
> " 'Where the ground of the motion is misconduct of the jury or of the officer in charge of same, or because of any communication made to the jury, or because the jury received other testimony, the court shall hear evidence thereof, and it shall be competent to prove such facts by the jurors or others in open court; and if the misconduct proven, or the testimony received, or the communication made, be material, a new trial may, in the discretion of the court, be granted.' "

And it was done in pursuance of a ground of the motion for new trial as follows:

> "There has been misconduct on the part of the jury in their deliberations and the determination in this cause and their verdict herein resulting from a failure to follow the law.

> "That the jury did not, as the law requires, reduce or attempt to reduce the amount of probable contributions that might have been made by Moser to his wife and to his child to a present value, and did not in their deliberations and determination of their verdict consider what the amount awarded might be made to earn if placed at interest and in safe investment, as is contemplated by law, and did not calculate or undertake to calculate the value of the contributions, all of which this defendant is ready to verify by the examination of the jury." (R. 49.)

The testimony and its consideration by the Court and the action of the court adverse to the Railroad Company's motion are all properly brought forward in the record (defendant's bill of exception G, R. 55 to 77).

Petitioner in the trial court and in the Appellate Courts by objections made at the proper time and place, challenged the sufficiency of the charge to make the jury understand—that is, to convey to the mind of an ordinary layman—the rule of the Kelly case that contributions to be made through the years must be reduced to present value.

It is insisted by respondent, however, that the charge was full enough and was sufficient to convey to the minds of the jury this important rule; and the Court of Appeals holds that "the language 'at this time,' clearly encompassed present value of future expectations," meaning, we take it, that it was sufficient to convey the rule to the minds of the jury.

If such is a proper construction of the effect of the charge (which we think it is not), then the argument may certainly proceed on the assumption that the jury being of average intelligence understood and are to be taken as understanding under the charge that it was their duty to reduce to present values; and if they did not do so that they disobeyed the charge of the Court.

The Texas statute quoted permits misconduct of the jury to be shown by the oral examination in open court.

In the recent case of *G. C. & S. F. Ry. Co. v. Harvey*, 276 S. W. 895, the Supreme Court of this State says:

> "As has been seen, the jury were expressly directed by the judge to disregard the legal effect of their answers to the questions submitted, but to answer each according to the court's instructions. And *yet, in violation of this express direction*, they made an agreement to give the defendant in error a certain sum as damages and then to answer the other questions so she should 'get the money.' * * * No agreement could lawfully have been made such as was made. Its making was an infringement of the legal rights of both parties *and a violation of the orders of the court*, from which manifest injury to the defendant in error ultimately resulted."

And later on in the opinion with reference to the agreement the court says:

> "Its making was in the *very teeth of the in-*

> *structions given to them by the trial court, to obey which was their duty as jurors.*"
>
> (The italics are ours.)

And again:

> "In the case of Payne v. Smith, 266 S. W. 441, the trial court told the jury not to consider certain testimony as to the amount paid by the plaintiff for medical services. Upon motion for new trial, two of the jurors testified the jury had included in the amount found for the plaintiff this sum. The trial court denied the motion and the Court of Civil Appeals held this was error citing with approval Southern Traction Co. v. Wilson, 254 S. W. 1104; H. & T. C. Ry. Co. v. Gray, 105 Texas, 42; Hines v. Perry, 238 S. W. 886; Payne v. Harris, 241 U. S. 1008, and San Antonio Traction Co. v. Cassanova, 154 S. W. 1190. In the case last cited, it is expressly held that the action of the jury in disregarding the instruction of the court was such misconduct as to require the granting of a new trial."

We submit that there can be no clearer misconduct on the part of the jury than to disregard and refuse to follow the charge of the court, and it will be noted from the Payne v. Smith case, 266 S. W., quoted from by the Supreme Court of Texas with evident approval, the only misconduct involved was the disobedience of the instructions of the court.

It is not our purpose to go into the details of the argument made in the State courts on the question of the misconduct of the jury.

We have not brought forward specifically the question of misconduct on the part of the jury in our application to this Court because the trial court having exercised its discretion in overruling the motion for new trial, the question of misconduct of the jury is one that this Court is not disposed to review. *Mattox v. U. S.*, 146 U. S. 140.

Besides this, the more we have considered the matter the more absolute to our minds it is that the error of the jury in not attempting to reduce to present values is chargeable to the Court and not to the jury.

We have gone thus far into the matter, however, that this Court may see that the testimony of the jury is brought before the Court under the express provisions of a Texas Statute and to sustain the charge that if the jury was in fact instructed to reduce to present values, that they disregarded the charge and were guilty of misconduct, resting the charge of misconduct on the express holdings of the Texas Courts that to disregard the court's charge was misconduct, under this statute.

The Railroad Company, beginning in the trial court, consistently insists that it has been deprived of a right under the Federal statute because the correct rule for measuring the damages has not been laid down and applied.

And following the Texas Statute expressly defining the practice it shows by the unanimous voice of the jury—all that were examined, nine of them—that *as a matter of fact* the Railroad Company was denied this Federal right.

So the unchallenged truth is that the jury verdict was arrived at in disregard of the Railroad Company's right.

But, not denying that the fact is established, nor that it is properly in the record, it is insisted that the Court should shut its eyes to the truth.

In the *Mattox v. U. S.* case, 146 U. S. 140, the following quotation from the opinion of Justice Brewer while on the Supreme Court of Kansas is made:

> "Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusion of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to their verdict.
>
> "But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law the affidavits were properly received."

We submit that the reason stated in the second paragraph of this quotation is the one applicable to the showing here.

It is the unanimous voice of the jury that speaks here—that is, practically so—that establishes the material fact; not the voice of one or two jurors seeking to overthrow the verdict. It is not the secret thought of one or of a few, but the unanimous voice of all who speak as to overt acts—no calculation was made, no figures used, no attempt to reduce to present values. Of course if any such attempt had been made it must have been known to practically all of the jury.

The testimony of this jury is not essential to our case. We challenged the propriety of the court's charge pointing out that it was too vague and indefinite and did not require reduction to present value, before the charge was read.

And under an analysis of the amount of the verdict made in the light of the testimony in the case and applying the rules of the Kelly and Gainey cases and made as has been done by courts of last resort in a number of cases both before and since the Kelly case decision was rendered (our Br. pp. 39 to 45), it is manifest that the rule of the Kelly case was not applied and that our objections to the court's charge were well taken.

Under the express rule of a Texas Statute with full opportunity for cross-examination, for a perfectly legitimate purpose, the jury are examined and by unanimous voice they show that the Railroad Company was right in its criticism of the charge—that it was too general and that it did not carry to the minds of the jury the highly important rule; and the testimony is properly brought forward as a part of the record.

A great judge has said: "While sacred is the verdict of a jury, more sacred is the right and justice of a cause."

Then why should testimony brought into the record by an established rule of practice and unchallenged, which absolutely and affirmatively shows beyond question that the defendant has been deprived of a substantial right, be disregarded?

After setting forth considerable of the testimony of the jury, counsel for respondent, predicating his statement on such testimony, says:

> "In the case at bar there was no misconduct on the part of the jury, no improper discussion during its deliberations; no new evidence received; each member of the jury having heard and considered the evidence and the charge of the court as he understood it." (Res. Br. 27.)

So he appeals to the testimony of the jury to establish that there was no misconduct and that the jury heard and considered the evidence and charge of the court and they understood it.

But he challenges the right of the Court to look to this same testimony that it may see that the charge as the jury understood it *did not* require any reduction to present values and that none was attempted.

(5)

The brief comments as to the other assignments made by respondent, pp. 27 to 29, need no response.

Aside from the quotation from the Holbrook case they make practically no reply to what we have said.

As to the Holbrook case we have not been able to find in any report of that case what the testimony as to personal qualities was. But surely the vague and indefinite showing made as to Moser's qualifications in this case were not sufficient to warrant submitting the issue to the jury.

Respectfully submitted,

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. [redacted] 53

GULF, COLORADO & SANTA FE
RAILWAY COMPANY, Petitioner,

vs.

MRS. OLENA MOSER,
ADMINISTRATRIX, Respondent.

On Certiorari to the Court of Civil Appeals of
Texas, Third Supreme Judicial District.

BRIEF FOR RESPONDENT

A. L. CURTIS,
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Salina Journal Print

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STATEMENT AS TO WANT OF JURISDICTION.

Respondent represents that by the rulings of the Court of Appeals petitioner was denied no title, right, privilege or immunity to which it was entitled under the Employers Liability Acts of Congress.

The instructions given by the trial court upon the measure of damages to be awarded were correct and are not subject to the criticisms urged by petitioner. These instructions are in accord with the decisions of this court in C. & O. Railway Co. vs. Kelley 241 U. S. 485; M. C. Railway Co. vs. Vreeland 227 U. S. 59 and L. & N. Railway Co. vs. Holloway 246 U. S. 525. The language of the charge to the jury was that they should fix same "at such sum of money, as if paid in cash at this time, would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of John H. Moser, if he had not died on the date alleged," etc.

The language, "as if paid in cash at this time," clearly encompassed present value of future expectations (Rec. 21). The Court of Civil Appeals, in its decision, adheres to the doctrine of this Court and its rulings in the C. & O.-Kelley Case, that plaintiff is entitled only to recover the present value of future contributions.

STATEMENT OF THE CASE.

J. H. Moser, a Railway Brakeman, was killed on the Gulf, Colorado & Santa Fe Railroad while engaged in the performance of his duties as an employee. His administratrix brought suit for the benefit of his widow and infant daughter, an action under the Federal Employers Liability Act, in a State Court in Texas. A verdict was rendered for $34,000.00. Judgment was entered on this verdict and was affirmed by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, 277 S. W. Reporter 722. The death of deceased J. H. Moser was the result of negligence on the part of the railway company in hauling in its moving train a car in such dangerous condition that the floor of the car gave way as he was passing over the same, causing him to fall through to his death.

TESTIMONY AS TO MOSER'S EARNINGS AND THE VALUE THEREOF.

Moser was only twenty-eight years old at the time of his death; had no bad habits; was in good health; strong, sober, industrious and efficient; and when not employed, at home with his family. (Rec. 78.) He had a public school education; was a good man; a devoted father and husband and a man who loved his family. (Rec. 91). (126.)

During the five years preceeding his death, not taking into account the time he was absent in the World's War, he had earned an average of more than $2,000.00 a year. (Rec. 86, 117 and 150). According to United States Mortality Tables he had a life expectancy of 36.73 years (Rec. 92). According to the rules of seniority in vogue with the railway company and its employees, he was in line for promotion to the position of conductor, and would probably have been promoted with an increase of pay within a few years, and had a reasonable expectancy of an average annual income of about $2,3000.00 for th remainder of his life or an aggregate total income of about $84,000.00 (Rec. 124).

TESTIMONY AS TO INTEREST RATES.

The witness Harrison on cross-examination testified: "It requires experience and skill to handle money in reasonable amounts. That in Texas and other parts of the country some money is loaned on safe securities at 3 1-2 to 4 1-2 per cent (Rec. 80)."

Ed Temple, a conductor for the Gulf, Colorado & Santa Fe Railway Company, testified that he received from 8 to 10 per cent on loans of money in the county of trial court; admitted on cross-examination that he rendered his notes for taxes and paid taxes for state, county and city aggregating $3.50 on valuation of $100.00. (Rec. 96).

The witness C. G. Cloud testified: "I know something of the different character of investments made in this country by men of means. I know that loans which are made by the issuance of bonds over a period of time, safe and sound securities on government bonds and on bonds of big concerns, loans of that kind are made not exceeding 4 per cent, and I also know that in the investment of any capital, that experience and skill is required in making safe investments. (Rec. 118).

Petitioner in its brief has correctly set out the charge of the trial court on the measure of damages. (Brief for petitioner page 19.)

TESTIMONY OF THE JURY.

J. J. Miller testified: "I tried to listen to all the evidence in the case, and after hearing all the testimony, I undertook as best I could, under the Court's charge, to allow in damages what I thought the parties were entitled to receive, and I took nothing into consideration outside of the evidence in doing that."

The Juror T. E. House testified: "I listened attentively to all the evidence in this case and to the court's charge, and under the Court's charge and under the testimony, I undertook to give in damages the amount I thought plaintiffs' were entitled to receive. I did not use figures, only in my head. Some of the men did. I did not write down any figures and undertake through a process of mathematical calculation to arrive at the correct figure, but after listening to all the testimony and considering the Court's charge, I undertook to allow what I thought they were entitled to recover. I do not know what mental process each of the other jurors had in arriving at the figures and the amounts they were for."

The Juror M. L. House testified: "After listening to all the testimony in the case, under the Court's charge, as I interpreted it, I undertook, according to my best judgment, to allow just what I thought the plaintiff was entitled to receive and no more. I did not undertake in coming to my conclusions anything further than a general consideration of all the evidence in the case and the Court's charge. The Court had charged us that we should allow to the plaintiffs such an amount as if paid at this time would compensate for the loss they had sustained by reason of his death. That is the way I tried to arrive at it, and I thought they were entitled to $40,000.00.

There was nothing discussed by the jury outside of the evidence and the Court's charge in our deliberations, that I know of. No discussion was made of any expense to which the plaintiff would be by reason of litigation, and no discussion was made as to reaching a verdict by lot, or by adding up and dividing what the jurors were for by twelve. The jury was unanimous on each of the issues submitted to them in deciding each question just as they were answered, except as to the amount, and we did all that at first, and every man on the jury was in favor of answering each question as it was answered and presented by the Court, except when we came to fixing the amount of damages, and on the subject of amount the jury took a ballot merely. We entered into no mathematical calculations, but took a ballot as to what each of us thought they were to receive. On the first ballot, without any attempt by the jury to make any mathematical calculations, each juror merely wrote down what verdict he was in favor of. Six of the jurors were for $30,000.00, one for $35,000.00 and five for $40,000.00. At no time did the jury enter into any mathematical calculations figuring rates of interest or the values of annuities or discuss any particular evidence along those lines, but we fixed these amounts and finally got together on $34,00000. I undertook, according to the best light I had before me, to return a just verdict under the evidence and the Court's charge. (Rec. 65 and 66.)

The testimony of the Juror Hudson was to the same effect. (Rec. 67 and 68.)

The Juror J. Y. Moreland testified in substance to the same effect and further: "The way in which I reached in my own mind what plaintiffs were entitled to receive was that I considered the evidence relating to how much the deceased was earning and his life expectancy and according to my figures that would run up to about $64,0000.00, and I thought to pay this at that time a reasonable award to plaintiff and was the amount I was for. I did not take a piece of paper and did not figure nor did the jury as a whole arrive at its verdict by means of any such calculations. We merely arrived at a verdict by each man writing down on a piece of paper the amount he was for, ranging from $30,000.00 to $40,000.00, and we finally got together and agreed on $34,000.00. There was no discussion in the jury room that we should take the respective amounts, add them together and divide them by twelve to arrive at our verdict, and we did not do that. There was no discussion in the jury room that we should give to his wife and child what he would have made in his entire life. There was no discussion in the jury room that we were to allow at this time only one-half of what he would make to his family and allow that all at this time without taking into consideration its present cash value. We merely arrived at our verdict by agreeing on $34,000.00, after discussing several different amounts under the testimony and under the Charge of the Court. (Rec. 70 and 71.)

The Juror E. W. Dunlap testified: "I understood we should take into consideration what he was earning and should pay them at this time what would justly compensate them for the pecuniary loss they had sustained. I did not undertake to give to them what I thought he would contribute to them during his entire life, if he had lived, but to pay them at this time what would justly compensate them for the loss they had sustained. (Rec. 72.)

The Juror Cass testified: "We figured on what Mr. Moser was earning. We figured on how much Mr. Moser would make in 36 years, his expectancy. You remember you lawyers figured how much that would come to and made these figures and we had them. We did consider how much he may have contributed each year to his wife and child, and as near as I remember it multiplied it by thirty-six years that he had to lived. I do not know that I at any time figured on that money as to what it would earn so as to reduce it to a present value. I did not make any calculations of interest at 8 per cent or 6 per cent or 7 per cent, and made no attempt to reduce the payment paid annually to a present value to calculate how much if paid now would amount to the same as a payment made each year at a given rate of interest. As far as I know, there was no misunderstanding of the jury in any way or misconduct of the jury or any discussion of any improper matters. (Rec. 73 and 74.)

The Juror R. H. Giles testified: "I listened to all the evidence in this case and undertook, according to my best judgment, to return a verdict under the evidence and the Court's charge, which would be a just verdict. As far as I know there was no misconduct of the jury or any discussion of improper matters. After hearing this evidence and considering it all, according to my best understanding, I was for $40,000.00. I did not undertake to say in my mind that because he would probably make $80,000.00 or more during his lifetime, she would be entitled to receive that all now. I was merely undertaking to give his wife and child that amount that would compensate them for his death for their pecuniary loss, as the Court charged us. (Rec. 74-75.)

The Juror J. F. DuBose testified: "I listened to all the testifony that was offered by the plaintiff and defendant. I heard the testimony as to probable life-expectancy and the testimony as to his earnings; what he had made in the past and what he would probably make in the future. Q. According to your best judgment, of course you don't recall the exact words of the Court's charge, but if the Court charged you that you should allow to Mrs. Moser at this time such an amount in damages as if paid at this time would justly compensate her for the pecuniary loss sustained by her, at the time of his death, is that what you tried to do? A. I tried to do according to the Court's charge. (Rec. 76.)

COUNTER PROPOSITIONS TO PETITIONER'S SPECIFICATIONS OF ERROR.

Counter Proposition to Specification (1)

The charge of the trial court to assess the damages "at such sum of money as if paid in cash at this time as would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving," etc., was correct. This was a clear, definite and specific instruction to award only present value of future contributions. However, inasmuch as the charge as given was correct, if the defendant in the trial court had desired a supplemental instruction, it cannot complain unless it had prepared and requested a special charge correctly presenting the same.

Counter Proposition to Specification (2)

The trial court did not err in refusing to give special charge No. 8, which erroneously sought to subject the jury's estimate to the rigid mathematical calculation that the money would be worth to the widow and minor child the highest rate of interest that the testimony showed had been made in Texas, on money safely invested, and that, although the testimony showed that interest on money invested on different classes of securities ranged from 3 1-2 per cent to 8 per cent and that in making investments of money on the various classes of securities experience and skill are required.

Counter proposition to Specification (3)

The amount of the award is not excessive. Is amply supported by the evidence; this was a question to be dealt with by the trial court and is not reviewable here.

Counter Proposition to Specification (4)

There being no misconduct on the part of the jury, no improper discussion during its deliberations, no new evidence received, each member of the same having heard and considered the evidence and the charge of the Court, as he understood it, the testimony of individual jurors as to how they reached their conclusions will not be inquired into. The verdict of the jury cannot be impeached in the absence of misconduct by showing the mental processes and calculations which guided the respective jurors, and this, like all other questions of procedure, is to be determined by the law of the forum.

Counter Proposition to Specification (5)

Defendant in the trial court was not entitled to an instruction that the award of damages to be made to the surviving wife and child for the loss of future contributions in the nature of pecuniary benefits should be reduced by the amount of the value of the probable services they would have rendered the deceased, had he continued to live.

Counter Proposition to Specification (7)

It appearing from the testimony that the deceased was a man of education, good character and habits, devoted and attentive to his child, industrious and efficient, spending his time, when not employed in the performance of his duties, at home, the jury were properly instructed that they might consider the pecuniary loss, if any, suffered by the minor child by reason of his death, such advice and training as the evidence might show the child would have received after the time of his death and during the period of the child's minority.

Counter Propositions to Specifications 6 and 8

Defendant was not entitled to have the jury instructed, as requested in either of these special charges. The same were upon the weight of the evidence and related only to matters for proper argument to the jury.

ARGUMENT

The charge of the trial court correctly applied the rule for the measure of damages as laid down by this Court in the case of C. & O. vs. Kelley. The charge of the Court, in language as forceful, clear, unmistakable and specific as the same could be made, instructed the jury on present values, that is, "such sum of money, as if paid in cash at this time, will be sufficient to compensate for such actual pecuniary loss as the surviving wife and child, from the evidence, had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of John H. Moser, if he had not died on the date alleged," etc.

The Court of Civil Appeals in the decision of this case and in the words of its opinion did not hold that plaintiff was entitled to recover the full value of future contributions as of the time they might be received, but on the contrary held that plaintiffs could only recover present value of anticipated pecuniary contributions, and the Court of Civil Appeals in its opinion used the following language:

"Appellant labors at great length to show that the trial court did not instruct the jury to reduce such future contributions as appellee's had a right to expect from the deceased had he lived to a present value. We find no merit in this. The language of the charge was that they should fix same "at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss," etc. The language "at this time" clearly encompassed present value of future expectations. In addition evidence as to annnuities, interest rates, interest bearing investments, etc., was introduced for the purpose of determining such present value, and the case was tried on that theory." (Rec. 128.)

This Court in the Kelly Case, 141 U. S. 485, speaking through Mr. Justice Pitney, said:

"The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. .....We do not mean to say that the discount should be at what is commonly called the "legal rate of interest", that is, the rate limited by law, beyond which interest is prohibited. It may that such rates are not obtainable upon the investments on safe securities; at least without the exercise of financial experience and skill in the administration of the fund, and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, however, where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily should be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits, it being a matter of common knowledge that as a rule the best and safest investments and those which require the least care, yield only a moderate return.

"We are not in this case called upon to lay down a precise rule or formula, and it is not our purpose to do this, but merely to indicate some of the considerations that support the view we have expressed; that in computing the damages recoverable for the deprivation of future benefits the principle of limiting the recovery to compensation requires that adequate allowance be made according to circumstances for the earning power of money. In short, when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon basis of their present value only.

"We are aware that it may be a difficult mathematical computation for the ordinary juryman to calculate interest on deferred payments with annual rests and reach a present cash value. Whether the difficulty should be met by admitting testimony of expert witnesses or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. Like other questions of procedure and evidence, it is to be determined according to the law of the forum.

"Vicksburg-M. R. Company vs. Putnam

118 U. S. 545, review of a judgment recovered in a circuit court of the United States in an action for personal injuries where the damages claim included compensation for the impairment of plaintiff's earning capacity. Assuming for the purpose of illustration that plaintiff's expectancy of life was thirty years. The trial judge instructed the jury that it would not be proper to allow him in gross the sum of the annual losses during his expectancy, that for the annuity will be payable one part this year and another part next year and each of the thirty parts payable each of the thirty years. You must have a sum such that when he dies it will all be used up at the end of thirty years. Having called attention to certain tables that were in evidence, he proceeded to say, "Add that to the present worth of annuity if you find he was damaged.' The judgment was reversed, not because of the recognition of the rule of present values, but because of the conclusive force that was given by the trial judge to the life and annuity tables. In the course of the opinion the court by Mr. Justice Gray said (page 554) that the compensation should include 'a fair recompense for the loss of what he would otherwise have earned in his trade or profession and has been deprived of the capacity of earning by the wrongful act of the defendant . . . . .' In order to assist the jury in making such estimate, standard life and annuity tables showing at any age the probable

duration of life and the present value of the life annuity are competent evidence . . . . . . But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury."

Even if the charge of the Court had been insufficient to instruct the jury specifically to reduce future expectations of pecuniary benefits to present values, petitioner cannot complain unless it had requested a supplemental instruction correctly presenting the same.

In L. & N. R. Co. vs. Holloway, 246 U. S. 525, Mr. Justice Brandeis, delivered the opinon of the Court, saying:

"Holloway, a locomotive Engineer, was killed on the Louisville & Nashville Railroad while engaged in the performance of his duties. His administrator brought, for the benefit of his widow, an action under the Federal Employers' Liability Act in a state court of Kentucky and recovered a verdict of $32,-900.00. . . . . The errors assigned in this court and now insisted upon are these:

The first assignment: That the Court of Appeals erred in approving the giving of an instruction and the refusal of another by which the trial judge had denied to the company the benefit of the rule declared in Chesapeake & O. R. Co. vs. Kelly, 241 U. S. 485, that in computing damages recoverable for the deprivation of future financial benefits, the verdict should be based on their present value.

The third assignment: That the Court of Appeals erred in refusing to reverse the judgment of the trial court on the ground that the damages were excessive, and in holding as part of the loss of benefits the widow might have received and which the jury was entitled to consider "not only her support and maintenance of $50.00 a month, but, in addition thereto, one-half of the savings which decedent might have accumulated if he had lived out his allotted span" of life.

(The instruction given was: The measure of recovery, if you find for the plaintiff, being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed; to-wit: $50,000.00.

The instruction refused was: "The Court instructs the jury that if they shall find for the plaintiff, their verdict cannot, in any event, exceed a sum which will yield, at interest at 6 per cent, a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his life-time, and had reasonable expectation of receiving from him if he had not been killed; and the Court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years."

No other instruction on the measure of damages was given, and none was requested except an instruction, not now insisted upon, limiting the recovery specifically to $13,737.-60).

First: The instruction given though general was correct. It declared that the plaintiff was entitled to recover "such an amount in damages as will fairly and reasonably compensate "the widow," "for the loss of pecuniary benefits she might reasonably have received," but for her husband's death. This ruling did not imply that the verdict should be for the aggregate of the several benefits payable at diffrent times, without making any allowance for the fact that the whole amount of the verdict would be presently paid at one time. The instruction bore rather an implication to the contrary; for the sum was expressly stated to be that which would "compensate". The language used was similar to that in which this Court has since expressed, in Chesapeake & O. R. Co. vs. Kelly, supra, P. 489, the measure of damages which should be applied. The company had, of course, the right to require that this general instruction be supplemented by another, calling attention to the fact that, in estimating what amount would compensate the widow, future benefits must be considered at their present value. But it did not ask for any such instruction. Instead it erroneously sought to subject the jury's estimate to two rigid mathematical limitations: (1) That money would be worth to the widow 6 per cent, the legal rate of interest; (2) That the period during which the future benefits would have continued was 28.62 years, —the life expectancy of the husband according to one of several well-known actuarial tables. The company was not entitled to have the jury instructed as matter of law either that money was worth that rate, or that the deceased would not in any event have outlived his probable expectancy. See Chesapeake & O. R. Co. vs. Kelly supra pp. 490-492. Nor need we determine whether the local rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed, and they are incorrect in form or substance it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in place of the defective one, (See Chesapeake & O. R. Co. vs DeAtley, 241 U. S. 310-316,) was applicable in the case at bar. That is a question of state law, with which we have no concern. In the DeAtley case, the Kentucky Court of Appeals assumed for the purposes of its decisions that the local rule applied, and was thereby lead to decide a question of federal law. Consequently, we had and exercised jurisdiction to review its decision upon that question.

Second: The Third Assignment, insofar as it relates to the refusal of the Court of Appeals to reverse the judgment, "'on the ground that the damages are excessive", is not reviewable here. Southern Railway-Carolina Div. vs. Bennett, 233 U. S. 80, it does not appear in the case at bar as it did in Chesapeake & O. R. Co. vs. Gainey, 241 U. S. 494, that the action of the Court of Appeals in sustaining the verdict was necessarily based upon an erroneous theory of Federal Law."

So we say in this case that it does not appear that the action of the Court of Civil Appeals in sustaining the verdict was based upon an erroneous theory of Federal Laws. On the contrary, the opinion of the Court of Civil Appeals expressly holds that plaintiffs were entitled only to recover present value of anticipated benefits.

The court did not err in refusing to give special charge No. 8, because the rule as to the correct measure of damages had already been covered by the Court's main charge, and for the reason that such special instruction would have been erroneous in that it would have subjected the jury to the rigid mathematical rule of calculating interest on the basis of the amount to be awarded and that at the highest rate of interest that the testimony shows could be had on money safely invested. There was some testimony showing that money had been safely invested at 8 per cent on certain classes of securities There was other testimony showing that loans on more substantial securities were made at rates of interest not exceeding 4 per cent, and that the investment of money on each line of security required experience and skill.

That the amount of the award is not excessive is amply supported by the evidence. Plaintiff was a young man twenty-eight years of age at the time of his death. He was in good health, strong, sober, industrious, efficient, and when not employed, at home with his family; that during the preceeding five years, not taking into account the time he was absent in the World's War, he had earned an average of over $2,000.00 a year; that according to the United States Mortality Tables he had an expectancy of 36.73 years; that he would probably have been promoted to conductor with an increase in pay within a few years and had a reasonable expectancy of an average annual income of about $2,300.00 for the rest of his life, or an aggregate total expected income of about $84,000.00; that an annuity of $2,000.00 a year for thirty-six years would cost $36,720.00; that deceased loved his family and was devoted to his child.

This Court in Southern Railway Company vs. Bennett, 233 U. S. p. 80, speaking through Mr. Justice Holmes, said:

"The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly according to principles established by Michigan G. R. Co. vs. Vreeland, 227 U. S. 59, but it is thought to be apparent as matter of law that the jury found more than the charge or the law allowed. The argument is this: The deceased was making not more than $900.00 a year and the only visible ground of increase was the possibility that he might be promoted from fireman to engineer, with what pay was not shown. He could not have given more than $700.00 a year to his family. His expectancy of life was about thirty years, by the tables of mortality. So, at the legal rate of interest the income from $10,000.00 for thirty years was all that the plaintiff was entitled to, whereas, she was given a principal of $20,000.00 out and out. It may be admitted that if it were true that the excess appeared as matter of law,—that if, for instance, the statute fixed the maximum and the verdict exceeded it, a question might arise for this Court, but a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error."

The testimony of the respective jurors as to what may have influenced them and what they may have considered in arriving at their verdict will not be heard to impeach the verdict and will not be considered for any purpose.

In Clyde Mattox, 146 U. S. 140, Mr. Chief Justice Fuller, after stating the case, delivering the opinion of the Court, said:

"The allowance or refusal of a new trial rests in the sound discretion of the Court to which application is addressed, and the result cannot be made the subject of review by writ of error, but in the case at bar, the District Court excluded the affidavits, and in passing upon the motion did not exercise any discretion in respect of the matters stated therein. . . . . . .

"In United States vs. Reid, 12 Howard 361-366, affidavits of two jurors were offered in evidence to establish the reading of a newspaper report of the evidence which had been given in the case under trial, but both deposed that it had no influence on their verdict. Mr. Justice Taney delivering the opinion of the Court said: 'The first branch of the second point presents the question whether the affidavits of jurors impeaching their verdict ought to be received. It would perhaps, hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution.' The opinion thus indicates that public policy which forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule, while at the same time, the necessity of great caution in the use of such evidence is enforced.

"There is, however, a recognized distinction between what may not be established by the testimony of jurors to set aside a verdict."

"This distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in Perry vs. Baily, 12 Kans. 539:

"Public policy forbids that a matter resting in the personal conscience of one juror should be received to overthrow the verdict, because being personal, it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve. Its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescense with the purpose of subsequent dissent.

"But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve". . . . .

"The subject was much considered by Mr. Justice Gray, then a member of the Supreme Judicial Court of Mass. in Woodward vs. Levitt, 107 Mass. 453, where numerous authorities were referred to and applied and the conclusions announced. 'That on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict'."

We also refer to a most complete, exhaustive and well considered opinion on this subject the opinion being written by Justice McClendon in Caylat vs. Railway Company, 113 Texas 131.

In the case at bar there was no misconduct on the part of the jury, no improper discussion during its deliberations; no new evidence received; each member of the jury having heard and considered the evidence and the charge of the court as he understood it; the testimony of individual jurors as to how they reached their conclusions may not be considered.

It appeared from the testimony that the deceased was a man of education, of good habits, of good health, 28 years of age; that his only child was an infant daughter about seventeen months old; that he was industrious and efficient; that he was a good man, spending his time, when not employed, at his home; that he loved his child and was a devoted father. This evidence fully met the requirements of this Court, as stated in M. C. Railway vs. Vreeland, 227 U. S. 59, where the following language is used:

"A minor child sustains a loss from the death of a parent and particularly of a mother altogether different from that of a wife or husband from the death of a spouse. In such a case it has been held that the deprivation is such as to admit of definite valuation. If there be evidence of the fitness of the parent and the child has been actually deprived of such advantages."

The Court of Civil Appeals in deciding this point did not decide adversely to petitioner a question, denying to it any right under Federal Law. On the contrary, it merely followed the decisions of this Court and in so doing used the following language: "When the character, education, habits and station in life of the father, the atmosphere in which his child is to be reared, and his affection for and interest in his child are shown, manifesting the fitness of the parent to furnish these elements, there was sufficient evidence to go to the jury on the loss of same, and it was within the discretion of the jury with this light before them to pass upon their value."

Citing M. C. Railway Company vs. Vreeland, 227 U. S. 59.

Mr. Justice McReynolds delivering the opinion of the Court in Norfolk & W. Railway Co. vs. Holbrook, 235 U. S. 624, said:

"In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed."

Defendant was not entitled to have the jury instructed as requested in special charges set out in its specifications of error 6 and 8, and in passing upon these assignments, the Court of Civil Appeals did not decide adversely any question of right arising under Federal Law, but correctly held, as stated in its opinion, that same, "were on the weight of the evidence and related to matters which were proper for argument to the jury."

We submit that this case should in all things be affirmed.

A. L. CURTIS,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 53.—October Term, 1927.

Gulf, Colorado & Santa Fe Railway Company, Petitioner,
vs.
Mrs. Olena Moser, Administratrix.

On Writ of Certiorari to the Court of Civil Appeals, Third Supreme Judicial District, State of Texas.

[November 21, 1927.]

Mr Justice McReynolds delivered the opinion of the Court.

Mrs. Moser, administratrix of her husband's estate, brought suit under the Federal Employers' Liability Act (c. 149, 35 Stat. 65; c. 143, 36 Stat. 291) to recover damages consequent upon his death while employed by petitioner as a brakeman. The point for consideration is whether the trial court charged the jury concerning estimation of damages according to the rule approved by this Court.

The cause went to the jury upon special issues framed as questions. Answers thereto constitute the verdict. Relevant parts of Special Issue No. 7 follow—

> Regardless of what your answers may be to the questions submitted in this charge, you will assess damages, and you will arrive at the amount thereof by assessing the same at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of the said John H. Moser, if he had not died on the date alleged. By pecuniary loss is meant such loss as may be compensated for in money. In answering special issue No. 7, you will take into consideration the contribution of money and other pecuniary benefits, if any, which the evidence may show that said surviving wife and child would have received from him after the time of his death, if he had continued to live; . . .

> In assessing the damages, if any, you will confine yourselves solely to the determination of the pecuniary and monetary interest, if any, that the plaintiff and her child had in the continued life of deceased. . . .
>
> Bearing in mind the foregoing definitions and instructions on the measure of damages, you will answer special issue No. seven. What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they respectively suffered by reason of his death, if any? This question you will answer by stating the aggregate amount of such pecuniary loss or damage, and you will answer in the space below the amount you find from the evidence.

Petitioner seasonably objected to the charge as "generally too broad and not definite and specific enough and the jury should be limited in their consideration of the measure of damages and the damages to be awarded, and should be further and more in detail instructed as to matters they can consider and the way their verdict should be arrived at more fully shown and in line with defendant's requested charges on the issue of damages." Also to Special Issue No. 7 because "it does not give the jury any rule or formula by which the jury may determine the amount of money that if paid now will fairly and reasonably compensate the surviving widow and child for the actual pecuniary loss." And it requested the following special instruction.

> In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining "such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child," for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased you will make your calculations on the basis of the amount of your award, bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and secured as shown by the testimony in this case.

This action sufficed to raise the point now presented. Refusal to grant the request was material error.

Chesapeake & Ohio Railway Company v. *Kelly, Admx.*, 241 U. S. 485, 491, and *Chesapeake & Ohio Railway Company* v. *Gainey, Admr.*, 241 U. S. 494, announce the applicable rule. In the first, we distinctly stated that "in computing the damages recoverable for the deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only." The interpretation approved by us has become an integral part of the statute. It should be accepted and followed.

The judgment below is reversed; and the cause will be remanded to the Court of Civil Appeals, Third Supreme Judicial District, State of Texas, for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.